Petition

81-1635

No.

Office - Supreme Court, U.S.
FILED
MAR 4 1982
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN B. ANDERSON, GEORGE H. HETRICK, LESLIE LAUFMAN, M.D., GERALD M. EISENSTAT,
Petitioners,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of Ohio,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in violation of the First and Fourteenth Amendments, Ohio invidiously discriminates against independent presidential candidates and burdens their constitutional rights and those of their supporters and electors, by requiring independent presidential candidates to qualify to appear on the general election ballot five months before partisan presidential candidates and eight months before the general election.

2. Whether the Court of Appeals applied an erroneous standard of review, in conflict with decisions of this Court and of other Courts of Appeals, in upholding Ohio's discriminatory and burdensome filing deadline requirements for independent presidential candidates.

3. Whether the Court of Appeals erred in concluding that this Court's summary affirmances in *Sweetenham v. Gilligan*, 409 U.S. 942 (1972) and *Pratt v. Begley*, 409 U.S. 943 (1972) control the disposition of this case.

4. Whether Ohio's March 20 filing deadline, as applied to independent presidential candidates, is inconsistent with the unique presidential selection process contemplated by Art. II, § 1 of the Constitution, and thus in violation of the Supremacy Clause, Art. VI, cl. 2.*

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* This question was not separately argued in the Court of Appeals but was properly raised before and argued in the District Court. Although this Court has indicated that it will not ordinarily consider issues not briefed in the Court of Appeals, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970), petitioners submit that a proper consideration of the questions posed by the Court of Appeals' decision should include this question and that it is well within this Court's power to hear. *Blonder-Tongue Laboratories, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 320 n.6 (1971).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals, *Anderson v. Celebrezze*, is reported at 664 F.2d 554 (6th Cir. 1981), and is set forth in Appendix A. The decision of the United States District Court for the Southern District of Ohio is reported at 499 F. Supp. 121 (S.D. Ohio 1980) and is set forth in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1981. On January 8, 1982, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 4, 1982. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute challenged by petitioners is Ohio Revised Code Ann. § 3513.257 (Page 1981), which is set forth in relevant part in Appendix C, hereto. Petitioners' challenge is based on the First and Fourteenth Amendments to the United States Constitution, and on Art. II, § 1 and Art. VI of the Constitution, which are also set forth in relevant part in Appendix C.

STATEMENT OF THE CASE

This petition seeks review of the decision of the United States Court of Appeals for the Sixth Circuit, upholding the provision of Ohio's election laws that requires an independent candidate for President to file a statement of candidacy and supporting signatures some five months before the established political parties must identify their candidates for the same office. *Anderson v. Celebrezze*, 664 F.2d 554 (6th Cir. 1981). This decision is in plain conflict with decisions of the First and Fourth Circuits, which found similar early filing deadlines for independent presidential candidates imposed by Maine and Maryland to be in violation of the First and Fourteenth Amendments. *See Anderson v. Quinn*, 634 F.2d 616 (1st Cir. 1980); *Anderson v. Morris*, 636 F.2d 55 (4th Cir. 1980).[1] Petitioners respectfully submit that the Sixth Circuit's decision is erroneous, and that the opinion itself and the conflict that it has generated clearly evidence a confusion in the lower courts regarding the import of this Court's prior opinions and the standards to be applied in resolving constitutional challenges to state laws restricting ballot access in federal elections. Petitioners therefore urge that

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[1] For the convenience of this Court these opinions, along with the District Court's decision in *Anderson v. Quinn*, are reprinted as Appendix D. The order of the First Circuit, but not its opinion, is reported at 634 F.2d 616 (1st Cir. 1980).

their writ of certiorari to the United States Court of Appeals for the Sixth Circuit be granted.

Section 3513.257 of the Ohio election statutes requires that independent candidates seeking a position on Ohio's ballot for President of the United States file a statement of candidacy and nominating petitions bearing the signatures of at least 5,000 qualified voters by the 75th day before the first Tuesday after the first Monday in June immediately preceding the general election. Accordingly, by the terms of Ohio law, petitioner John B. Anderson [2] would have been required to submit his statement for candidacy no later than March 20, 1980, some 229 days before the general election and approximately five months prior to the time that Ohio law requires political parties to identify their candidates for President. *See* Ohio Rev. Code Ann. §3505.10 (Page 1981). Petitioner Anderson did not decide to seek the presidency as an independent candidate until April 24, 1980.[3] When he tendered nominating petitions on May 16, 1980, respondent Celebrezze rejected them on the sole ground that they were not

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[2] The other petitioners are individuals who wished to support petitioner Anderson's presidential campaign. Petitioner Leslie Laufman, M.D. is a duly registered Ohio voter who wished to cast her vote for petitioner Anderson in the general election, and petitioner George H. Hetrick, also a registered voter in Ohio, was designated to seek certification as a candidate for presidential elector pledged to petitioner Anderson's candidacy. Petitioner Gerald M. Eisenstat is a duly registered voter in the State of New Jersey, which, at the time this case was initiated in the District Court, had certified petitioner Anderson's name for inclusion on its election ballot. Petitioner Eisenstat maintained that exclusion of petitioner Anderson from the ballot in Ohio, the sixth most populous state, would dilute the impact of his vote in New Jersey.

[3] Petitioner Anderson, at the time a Republican Congressman from Illinois, initially sought the Republican Party's nomination. As indicated above, on April 24, 1980, petitioner Anderson abandoned his quest for the Republican nomination, and announced that he would seek the presidency as an independent candidate. Petitioner Anderson and his supporters ultimately succeeded in placing his name on the ballots of all fifty states, and he received some seven percent of the popular vote in the general election.

timely filed. *See generally Anderson v. Celebrezze, supra*, 664 F.2d 554, Pet. App. 3a.[4]

Shortly thereafter, the petitioners filed suit in the District Court, contending that the early deadline provision of Ohio's law violated the First and Fourteenth Amendments to the United States Constitution, as well as Art. II, § 1 and the Supremacy Clause, Art. VI, cl. 2. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343 (3), 2201-02, as well as 42 U.S.C. § 1983.

The case was promptly submitted for decision on cross motions for summary judgment and on the basis of the parties' joint stipulation of fact, which the District Court relied on and appended to its decision. *Anderson v. Celebrezze*, 499 F. Supp. 121, 139-46 (S.D. Ohio 1980), *rev'd*, 664 F.2d 554 (6th Cir. 1981); Pet. App. 66a-80a. The District Court concluded that the Ohio deadline as applied to independent presidential candidates imposed a substantial burden on the petitioners' fundamental constitutional rights to associate for the advancement of political beliefs and to vote for the candidate of their choice. The court further ruled that the Ohio deadline invidiously discriminated between independent candidates and partisan candidates for President. Finding that this burden and the discrimination among candidates for the same office were not justified by the interests that respondent had advanced in its support—promoting equality of treatment by requiring independent candidates to file at the same time as primary contestants, Ohio Rev. Code Ann. § 3513.05 (Page 1981), and furthering political stability by requiring early disaffiliation of independents—the District Court ruled that the early filing deadline of Ohio

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[4] The provision of section 3513.257 requiring that the statement of candidacy be accompanied by the signatures of at least 5,000 qualified Ohio voters was not challenged by the petitioners, since the Anderson supporters obtained the signatures of more than 16,000 Ohio residents during a five day period preceding the submission of the statement of candidacy.

law was invalid,[5] and ordered respondent to place petioner Anderson's name on the Ohio ballots as an independent candidate for President.

While recognizing that the Anderson plaintiffs had prevailed in this case on substantially the same grounds that had been relied on and affirmed in the First and Fourth Circuits, the Court of Appeals nonetheless reversed.[6] The Sixth Circuit's decision rests on two grounds. First, the court determined that the combined effect of this Court's summary affirmances of *Sweetenham v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham v. Gilligan*, 409 U.S. 942 (1972), and *Pratt v. Begley*, 352 F. Supp. 328 (E.D. Ky. 1970), *aff'd*, 409 U.S. 943 (1972) was to signal this Court's intention to settle the constitutionality of Ohio's and Kentucky's early filing deadlines for future elections, Pet. App. at 10a, and thus disposed of petitioners' First Amendment challenge to the Ohio statute, *id.* at 12a. Admitting that its reading of this Court's summary affirmances of *Pratt* and *Sweetenham* was "rather a slender reed on which to rest our decision," *id.*, however, the Sixth Circuit turned to the merits and developed an alternative ground for upholding the Ohio statute.

The Sixth Circuit characterized the District Court's analysis as "thoughtful,", Pet. App. 4a, but ultimately concluded that the District Court had erred in requiring Ohio "to prove too much." *Id.* at 18a. Although it acknowledged that this Court's decisions in *Storer v. Brown*, 415 U.S. 724 (1974) and *Illinois State Board of*

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[5] The District Court accordingly did not decide whether the early filing deadline was inconsistent with Art. II, § 1 and the Supremacy Clause, Art. VI. 499 F. Supp. at 124 n.1, Pet. App. 32a, n.1.

[6] Respondent sought this Court's review in advance of the Court of Appeals' decision. On September 18, 1980, this Court denied respondent's petition for writ of certiorari prior to judgment, thus allowing the case to be resolved by the Sixth Circuit. *See Celebrezze v. Anderson*, 101 S.Ct. 41 (1980). Justices Stewart, White and Rehnquist dissented.

Elections v. Socialist Workers Party, 440 U.S 173 (1979), appeared to require that a state demonstrate a compelling interest in support of ballot access restrictions, the Court of Appeals refused to apply that analysis. Instead, it determined that the burdens imposed on the presidential electoral process by Ohio's early filing deadline could be justified by some "lesser interests," *Anderson v. Celebrezze*, *supra*, Pet. App. 18a, that are "rationally further[ed]" by the statute in question. *Id.* at 21. The court noted that the state's chosen deadline was entitled to "a good deal of deference," Pet. App. 23a, and then proceeded to construct a rationale for the statute—enhancing voter knowledge of candidates, Pet. App. 20a—that had not previously been seriously advanced as justifying its restrictive and discriminatory impact. Pet. App. 4a-5a, 52a-63a. The Sixth Circuit thus ultimately concluded that the Ohio law "rationally" furthered the interests perceived by the Court sufficiently to justify the resulting infringement on ballot access.

REASONS FOR GRANTING THE PETITION

The decision in this case is in plain conflict with decisions of the First and Fourth Circuits striking down the similar early filing deadlines of Maine and Maryland. Not only has the Sixth Circuit mistakenly construed the precedential import of this Court's summary affirmances in *Sweetenham* and *Pratt*, it has set forth an amorphous and vague standard for assessing ballot access restrictions that is inconsistent with a long line of this Court's considered opinions. Finally, even assuming that the general standard of review articulated and applied in this case were constitutionally permissible, the court's imaginative construction of a rationale to support this statute was not. In the final analysis, the Sixth Circuit sustained this statute by creating a purported state interest that is nowhere to be found in the statute or its legislative history, and that was barely alluded to by respondent in either the district court or the court of appeals. In

doing so, moreover, the court ignored the actual history of the filing deadline and erroneously minimized the nature of the burden it imposed on the rights of voters and citizens, as well as candidates. Petitioners therefore respectfully submit that a writ of certiorari should be granted, and that the opinion below should be reversed.

I. The Decision Below Is Erroneous and Is In Conflict With Prior Decisions of This Court

It has repeatedly been emphasized that,

> "Restrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'"

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S 173, 184 (1979), quoting *Williams v. Rhodes*, 393 U.S 23, 30 (1968). Thus, beginning with *Williams v. Rhodes*, this Court has laid down a clear set of principles to be applied in assessing the constitutionality of state laws substantially restricting access to the ballot. Where such fundamental rights are at issue, it is now well established that the state must demonstrate nothing less than that the statute is "necessary to further compelling state interests." *American Party of Texas v. White*, 415 U.S. 767, 780 (1974); *Kusper v. Pontikes*, 414 U.S. 51, 56-59 (1973); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979).[7] As the District Court found, Ohio's filing deadline for independent presidential candidates does not meet these standards.

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[7] Particularly where a statutory classification is shown to discriminate in treatment of candidates or voters based on their political affiliation, the courts must insist as well that the classification drawn into the statute be, at the very least, reasonable in light of its purpose. *See, .eg., Carrington v. Rash*, 380 U.S. 89 (1965).

A. Ohio's Unreasonably Early Filing Deadline for Independent Presidential Candidates Unconstitutionally Burdens Fundamental Rights and Invidiously Discriminates Against Independent Candidates Without Serving Any Compelling State Interests

As the District Court held, Ohio's early filing deadline burdens and abridges fundamental rights of voters and candidates alike. In so holding, the District Court did not rely simply on the fact that it would have prevented petitioner Anderson from appearing as a candidate on the Ohio ballot in the November election. The District Court also noted that, in view of the substantial percentage of the public support that existed for petitioner Anderson in Ohio and elsewhere, the burdens on the associational and voting rights of others were substantial. Pet. App. 38a-39a. This burden was particularly great because the filing deadilne was substantially earlier and thus out of line with those in the great majority of other states.[8]

Not only was this burden severe, it fell with a substantial discriminatory impact, since partisan presidential candidates need not be designated to Ohio's Secretary of State, or take any other action in Ohio, or elsewhere, until late August--five months after the independent presidential contender must fully qualify for ballot access. Thus, partisan candidates nominated by their parties' midsummer conventions will appear on Ohio's general election

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[8] As the record before the District Court demonstrated, well over thirty states have filing deadlines for independent candidates that coincide with or fall after the time when the major parties generally hold their national nominating conventions. Only four other states had filing deadlines prior to April 24, 1980, when Petitioner Anderson decided to run as an independent. Petitioner Anderson challenged each of these deadlines. The statutes in Maine, Maryland and New Mexico were declared unconstitutional. *Anderson v. Quinn*, No. 80-1551 (1st Cir. Sept. 17, 1980), *aff'g*, 495 F. Supp. 730 (D. Me.); *Anderson v. Morris*, 636 F.2d 55 (4th Cir. 1980), *aff'g*, 500 F. Supp. 1095 (D. Md.); *Anderson v. Hooper*, 498 F. Supp. 905 (D. N.M. 1980). The early filing deadline in Kentucky was found to be inapplicable as a matter of state law. *Anderson v. Mills*, 497 F. Supp. 283 (E.D. Ky. 1980), *aff'd*, 664 F 2d 600 (6th Cir. 1981).

ballot, regardless of whether they ran in Ohio's primary, while an independent candidate failing to qualify 75 days before the June primary (in which he or she does not run) is wholly excluded. This discrimination—permitting the major party nominee to emerge as late as the summer conventions while forcing independents to enter the race and fully qualify by March—is both real and substantial. The Court of Appeals made every effort to minimize or overlook this statutory discrimination, by seeking to suggest that it was a mere formality or technicality. *See, e.g.*, Pet. App. 3, 23a n.15. In so doing, it ignored the lessons of both recent and past political history, which demonstrate that major parties do nominate persons who were neither declared candidates nor widely regarded as potential contenders in March or April of the election year, and who failed to enter state primaries.[9]

In view of the burdensome and discriminatory impact of this filing deadline, the State of Ohio was plainly required to demonstrate that the classification was intended to serve a compelling state interest and that it was reasonably designed to do so. But, as the District Court found, this standard was not and could not be met. The Court of Appeals apparently agreed, for it found it necessary to construct an entirely different standard in order to sustain the statute.

Only two compelling interests were seriously advanced in the District Court in support of this filing deadline: first, that it is required in order to assure equal treat-

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[9] Following President Johnson's announcement in late March, 1968, that he would not seek reelection, Hubert Humphrey was the Democratic nominee, even though he did not enter the primaries. In 1952, Dwight Eisenhower did not declare his candidacy until June, and his name had been entered in only 8 primaries. The Democrats in 1952, moreover, nominated Adlai Stevenson by a floor draft, notwithstanding his failure to seek nomination or to participate in most primaries (including Ohio's), and the overwhelming primary victories that Estes Kefauver had enjoyed. Congressional Quarterly, Inc., Presidential Elections Since 1789, 119-63 (2d ed. 1979); E. H. Roseboom, A History of Presidential Elections, 509 (2d ed. 1964); T. H. White, The Making of the President 1968, 107-125 (1969).

ment of partisan and independent candidates, and second, that it is required to promote "political stability" through assuring the "true independence" of independent candidates by requiring early "disaffiliation" from political parties and their primaries. Neither of these asserted interests, however, is sufficient to sustain this deadline.[10]

As every court to have addressed the "equality" argument has found, it is simply irrational: requiring independent presidential candidates to qualify for the general election ballot at a time when partisan presidential contenders *may* qualify for a primary that has no necessary relationship to their entitlement to appear on the general election ballot is not equal treatment.[11] *See* Pet. App. 42a-43a. Moreover, as set forth above, it is no accident that Ohio does not require the major party nominees to have registered with it in March, since recent history reveals several instances where the party Presidential nominee was not even a declared candidate at the time of Ohio's early filing deadline. *See* note 9, *supra*.

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[10] Although the most basic and common reason for a filing deadline is an administrative need to have a point in time at which all necessary petitions are before the appropriate state agencies for processing and verification, the State stipulated that it does not begin administratively processing these petitions until June 15—three months after they were required to be filed—and further conceded that all necessary administrative tasks would be completed within seventy-five days of the commencement of this processing. *See* Pet. App. 73a, 79a. Ohio thus conceded at the outset that the March 20 filing deadline was unrelated to its legitimate administrative needs. Pet. App. 52a.

[11] The statute would achieve this "equality effect" for all other offices, however. Primary elections for state office, or even for federal offices such as Representative or Senator, in fact choose the party nominee for that office. Thus, as applied to these offices, the filing deadline for independents does treat "equally" the partisan and independent candidates, insofar as it requires all of them to declare their candidacies at the same time. A Presidential primary, of course, does not choose the party's nominee but simply selects delegates to the national party convention. *Cf.* Ohio Rev. Code Ann. § 3513.12 (Page 1981).

Nor does the "political stability" argument sustain this statute. The filing deadline cannot plausibly be regarded as a "disaffiliation" provision designed to assure the true independence of independent candidates, as the State argued in the District Court, nor as a more general device to promote political stability by protecting the integrity of different routes (*e.g.*, major party, minor party or independent) to the general election ballot. As the District Court observed, the filing deadline on its face does not purport to promote these goals, as does a "disaffiliation" or "sore loser" statute, Pet. App. 54a-56a,[12] or as would a statute expressly prohibiting simultaneous filing of independent and partisan nomination petitions, *e.g.*, California [Election] Code § 6402(b) (Deering 1981).[13] Moreover, the Ohio legislature did act directly in this field, by enacting a "sore loser" provision designed expressly to prevent a partisan candidate from bolting the party and appearing on the ballot as an independent if dissatisfied with the results of the primary. Ohio Rev. Code Ann. § 3513.04 (Page 1981). Ohio's legislature, however, provided that a *presidential* candidate can *withdraw* from the primary up to 30 days beforehand. Ohio Rev. Code Ann. § 3513.30 (Page 1981). Anderson did so, and thus the State conceded even before this litigation began that the "sore loser" provision did not bar him from the ballot.

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[12] As the District Court noted, the filing deadline "acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design." 499 F. Supp. at 135, Pet. App. 55a. The deadline does not assure that candidates previously affiliated with a party do not run as independents, permitting as it does a registered Republican to appear as an independent candidate if the nominating petitions are filed by March 20, but does preclude the most non-partisan of independent candidates from appearing thereafter.

[13] Under Ohio law, there does not appear to be a prohibition on a candidate simultaneously filing a nominating petition to appear as both an independent and partisan candidate for office. *Cf. State ex rel. Donnelly v. Green*, 106 Ohio App. 61, 148 N.E. 2d 519 (Ct. App. 1958) (candidate filing two petitions for inconsistent office could, if timely, withdraw one and be certified to the ballot for the other).

Pet. App. 68a (¶ 7). And, as petitioners argued below, if this statute were to be regarded as one designed to promote political stability by protecting the integrity of different routes to the ballot, it would be so "riddled with exceptions" that it could not reasonably be regarded as satisfying that aim. *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972).[14]

The Court of Appeals apparently agreed with the District Court that this filing deadline was not intended to and does not operate in any rational fashion as a device to assure the stability and integrity of the different routes to the ballot, for it did not rely on these rationales to sustain the deadline. Instead, applying an unarticulated standard of review seemingly designed simply to permit it to sustain this filing deadline, the Court of Appeals concluded that the statute was intended to serve a purpose other than those principally advanced by respondent which was not expressed in the structure of the statute and is affirmatively belied by its legislative history. In so doing, the Court of Appeals deliberately flouted both the standard of review and method of analysis contemplated by this Court's ballot access decisions.

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[14] For example, a candidate such as Anderson could have appeared on Ohio's November election ballot if he had received a minor party nomination and been certified to the Secretary of State as its candidate up to 75 days before the general election. Ohio Rev. Code Ann. § 3505.10 (Page 1981). Likewise, petitioner Anderson could have qualified as a write-in candidate for the Presidency at any time up to 40 days before the election simply by filing a declaration of intent with the Secretary of State. Ohio Rev. Code Ann. § 3513.041 (Page 1981). And the filing deadline does not appear to preclude a candidate from petitioning in March to appear on Ohio's general election ballot as an independent but then appearing on that ballot as a partisan nominee. The continued availability of these alternatives indicates that Ohio does not generally seek to promote the separateness of different routes to the ballot by requiring early choices about running as an independent or party candidate through the filing deadline.

B. The Decision of the Court Below Ignored Settled Principles Enunciated In This Court's Ballot Access Decisions

The court below eschewed traditional equal protection analysis in its effort to sustain the validity of this invidious filing deadline. Indicating that, "the District Court required Ohio to prove too much," Pet. App. 18a, in requiring Ohio to justify the discriminatory and burdensome application of the filing deadline to independent presidential candidates as necessary to serve a compelling interest, the Court of Appeals instead suggested that the burden and discrimination, if any, were minor and accordingly could be "justified by lesser interests." *Id.*[15]

In so holding, the Court of Appeals misunderstood and misapplied this Court's recent ballot access decisions. The Court below expressly declined to follow this Court's holding in *Illinois State Board of Elections v. Socialist Workers Party*, that, when a substantial discrimination in ballot access is established, "a state must establish that its classification is necessary to serve a compelling interest." 440 U.S. 173, 184 (1979), quoted at Pet. App. 18a-19a. It also ignored the numerous other decisions of this Court in the last fifteen years which have held that substantial burdens on fundamental rights such as those at issue here will only be sustained if it is demonstrated that they are necessary to serve a compelling state interest. *See, e.g., American Party of Texas v. White*, 415 U.S. 767, 780 (1974) ("whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests"); *Lubin v. Panish*, 415 U.S. 709, 716 (1974); *Storer v. Brown*, 415 U.S. 724,

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[15] The Court of Appeals appears to suggest that only where state law effectively grants a monopoly to the major parties need infringements and discrimination affecting First Amendment rights be justified by compelling interests. Pet. App. 18a.

736 (1974). Just last Term, this Court again demonstrated that where a state seeks to burden or interfere with fundamental First Amendment political rights—rights of voting and "to gather in association for the purpose of advancing shared beliefs,"—nothing less than a compelling interest will justify that intrusion. *Democratic Party of the United States v. LaFollette*, 450 U.S. 107, 120-24 (1981).[16]

Moreover, once having concluded that the burdensome and discriminatory impact of this filing deadline did not require close scrutiny, the Court of Appeals compounded its error by declining to follow this Court's injunction that the legitimacy of a challenged classification must be determined by reference to the " 'facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' " *Storer v. Brown*, 415 U.S. at 730, *quoting Williams v. Rhodes*, *supra*, 393 U.S. at 30. Instead, the Court of Appeals *ignored* the actual "facts and circumstances" behind the law and did not address the principal interests asserted by the State. See Pet. App. 4a (describing Ohio's argument). Instead, the court advanced an interest *it* concluded was important, and minimized the interests of those persons disadvantaged by the law.

The Court of Appeals did not allude even indirectly to the legislative history of the filing deadline in question which, petitioners argued below, strongly indicated that its intent was not to foster any permissible state interests, but rather to serve the impermissible interest of excluding from the ballot any serious contender other than nominees of the two major parties. Prior to 1948, the filing deadline for independent candidates for office

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[16] *Cf. Mathers v. Morris*, 515 F. Supp. 931 (D. Md.), *aff'd*, 649 F.2d 280 (4th Cir.), *aff'd*, 102 S.Ct. 467 (1981) (applying compelling interest standard of *Illinois State Board*, court struck down filing deadline for independent candidates for special election that coincided with deadline for partisan contenders in special primary for that election).

in Ohio was set sixty to ninety days prior to the *general* election. As this Court found in *Williams v. Rhodes*, *supra*, the State of Ohio, in response to Henry Wallace's 1948 independent presidential candidacy, amended its election laws to make it virtually impossible for anyone other than the major parties to field a presidential candidate. Among these changes was the moving of the filing deadline for independent candidates to ninety days before the *primary*, rather than the general election. 124 Ohio Laws 673 (1951). Indeed, the February filing deadline was specifically averted to by this Court in *Williams v. Rhodes* in holding that Ohio's then existing scheme unconstitutionally burdened the rights of non-major party contenders to appear on the ballot, 393 U.S. at 26-27, 32-34, and was thereafter expressly referred to in *Jenness v. Fortson*, 403 U.S. 431, 438 (1971), as being "unreasonably early." Since then, the harshness of the deadline has been ameliorated but a little by minor amendments which moved the filing deadline for independents to a date seventy-five days, rather than ninety days, prior to the primary, and which also advanced the primary date. As the District Court found, "[t]his filing deadline has emerged virtually unscathed" from the complex of invidious enactments before this Court in *Williams*. Pet. App. 33a.

Without even mentioning this history, the Court of Appeals ignored the State's principal arguments in support of the deadline and articulated a different purported interest to sustain the early filing deadline—that of ensuring "that voters making the important choice of their next president had the opportunity for a careful look at the candidates, a chance to see how they withstand the close scrutiny of a political campaign." Pet. App. 20a.[17]

[17] The only references to such an interest that can be gleaned from the State's briefs in this matter arise in its arguments that the filing deadline does not discriminate against independents in that it treats them equally with partisan contenders. In this context the State argued, in passing, that if independents were permitted to file after partisan primary candidates, an independent candidate

A brief review of Ohio law demonstrates that the State's failure to place reliance on this interest is explained by the fact that the Ohio legislature has simply not sought, through this filing deadline, to achieve that goal.

While measures to enhance voter education may no doubt serve worthy goals, Ohio does not even purport to achieve this goal in its filing deadline and related provisions. Ohio has not manifested an intention to require all presidential candidates to be in the public eye for a significant time and, even if it could be said that it had, it has not done so in an even-handed and non-discriminatory manner.[18] For example, Ohio does not require the major

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might emerge just before the primary and, based on a "superficial" and short exposure, influence voters either not to vote in the primary or to change their votes in the primary. But the State never sought to advance this interest as a compelling one justifying the filing deadline under the standards required by this Court's prior decisions.

Indeed, in *Salera v. Tucker*, 399 F. Supp. 1258, 1268 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976), the District Court rejected as a justification for an early filing deadline for independents the argument that it would enhance the intelligent exercise of the vote in primary elections:

> "the primary voter will still not know the identity of a much more significant factor in the general election, i.e., the identity of the other major party candidate. Thus, a substantial obstacle to an independent candidate's ability to get on the ballot is justified by reference to what is at best a marginal increase in knowledgeable voting. We believe this state interest is insufficiently compelling to warrant the burden on independent candidates which results from the early filing date."

[18] This Court has already considered and rejected a similar rationale as one capable of sustaining a burdensome and discriminatory requirement. In *Storer v. Brown*, *supra*, the appellees had sought to justify a requirement that independent candidates' petition-gathering activities be limited to a twenty-four-day period in mid-summer by arguing that their "canvassing for signatures should await the announcement of the primary winners and the promulgation of party platforms so that the voters eligible to sign, *i.e.*, those not voting in the primary, will have a meaningful choice between the primary nomination and the independents." 415 U.S. at 743, n.13. This Court gave that argument short shrift: "This does not

parties to provide a list of all potential candidates who will appear on the primary ballot to seek to assure that the voters have information and an opportunity to express their views on all then-potential candidates. *Comp., e.g., Democratic National Party of the United States v. LaFollette, supra*, 450 U.S. at 110-11, n.3 (indicating that Wisconsin's primary law required the listing by each major party of "all potential candidates"). Instead, only those candidates whose delegates affirmatively seek to participate in Ohio's primary will appear on the ballot. Ohio Rev. Code Ann. §§ 3513.12, 3513.13 (Page 1981).

There is simply no evidence to suggest that Ohio's legislature ever sought to assure that all likely candidates for the presidency would begin campaigning in Ohio in early March. Indeed, not only does Ohio not purport to require the listing of "all potential candidates," but it contains no other mechanism—such as designation by the Secretary of State of "nationally recognized" candidates, *comp., e.g.*, Mich. Comp. Laws Ann. § 168.614 (1981)—for putting candidates before its voters *other* than through that candidate's own decision to participate in Ohio's primary.

In sum, partisan contenders remain free, insofar as Ohio is concerned, never to campaign in Ohio at all and Ohio nonetheless permits a partisan candidate to appear as a choice for the voters on the November ballot if he or she secures a party nomination. In view of the actual structure of Ohio law, the Court of Appeals' effort to "discern" a legitimizing purpose, Pet. App. 18a, must be rejected for the after-the-fact judicial rationale it so plainly is.

While some restrictions on ballot access and voting rights have been sustained by this Court under the "compelling state interest" test, this has occurred only

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appear to be a matter particularly relevant to signing petitions for ballot position, for the meaningful choice referred to by appellees will be finally presented at the general election." *Id.* Here, too, the meaningful choice is the one that will be presented at the November general election.

where the Court has found that a state law was "tied to a particularized legitimate purpose." *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973); *Storer v. Brown, supra*, 415 U.S. at 731. But the courts "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrate that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 648 n.16 (1975); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974). Thus, the "mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Weinberger v. Wiesenfeld*, 420 U.S. at 648. Certainly these admonitions cannot be read to authorize the reviewing court to ignore the structure and history of a statute, to invent a rationale and rest on it as a basis for sustaining such restrictive legislation.

On its face, this statute seems intended to require independents to file with the partisan primary candidates. Whatever the merits of such a requirement with respect to statewide offices for which candidates are actually chosen in that primary, it serves no compelling or even rational state purpose in the presidential context, where they are not. As the Court of Appeals implicitly acknowledged, in the presidential context a single state simply is not capable of assuring through early filing and registration requirements that its voters be exposed to the range of candidates that may emerge in the national party convention process. Pet. App. 22a. Unlike the selection process for state wide offices, the presidential selection process is one in which the 50 states participate over time. The names of potential contenders shift and change until, by late summer, the major party contenders are selected. Regardless of their prior activities in Ohio or elsewhere, the party nominees will appear on the Ohio ballot. Since Ohio does not preclude the parties' candidates from appearing on its general election ballot because the candidate did

not enter Ohio's primary or generally declare his candidacy in March, it cannot so severely infringe the rights of independent candidates in pursuit of a policy not even-handedly pursued.

The Court of Appeals, moreover, erroneously minimized the burden this statute imposes on the exercise of core First Amendment rights by assuming that it burdened only independent candidates. Pet. App. 24a. An early filing deadline, however, substantially abridges the associational and voting rights of independent-minded voters by denying them *any* opportunity after March 20 to have *any* independent candidate expressive of their political views appear on the general election ballot; in this regard, a filing deadline is a greater infringement on voters' rights than is a disaffiliation provision which disqualifies only particular candidates. *Cf. Storer v. Brown, supra.* The Court of Appeals' analysis of the proper comparison between independent and party candidates suffers from the same defect, since it concludes that, in contrast to the interest of political parties, only the independent candidate himself has an interest in being able to enter the selection process after March 20. But political parties are, fundamentally, associations of persons gathered together for political purposes; that independent-minded voters do not form an ongoing political party does not deprive them of associational rights. These associational rights—such as the right to coalesce around an independent candidacy—are no less infringed by this early filing deadline than would the rights of a political party be infringed if its ultimate nominee were barred from Ohio's general election ballot.[19]

To permit a state to require independent candidates to declare themselves for the purpose of voter education five months before a major party candidate need announce

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[19] Cf. Pet. App. 62a (District Court noted lack of compelling state interest in preventing emergence of independent candidacies in response to newly emerging events particularly when such candidacies "reflect the conscience of a substantial number of voters.")

any interest in the position at all is a discrimination in law which simply cannot be sanctioned. Moreover, this was not the purpose of this statute nor is it a discernible general policy of Ohio law. Because the Court of Appeals has misconstrued and misapplied this Court's prior decisions concerning the standard of review in adjudicating ballot access challenges, and this Court's general principles of equal protection analysis, certiorari should be granted and the judgment below reversed.

II. The Decision Below Is in Direct Conflict with Decisions in Two Other Courts of Appeals

Not only is the Court of Appeals' decision inconsistent with the principles established in this Court's prior rulings, but it also is in direct conflict with the unanimous rulings of the two other United States Courts of Appeals which reviewed the validity of early filing deadlines challenged by petitioner Anderson. *Anderson v. Quinn*, 495 F. Supp. 730 (D. Me.), *aff'd*, 634 F.2d 616 (1st Cir. 1980); *Anderson v. Morris*, 636 F.2d 55 (4th Cir. 1980).

In *Anderson v. Quinn, supra*, the First Circuit affirmed the district court decision of Judge Gignoux in an unpublished memorandum decision. Judge Gignoux had found unconstitutional the provisions of a Maine statute requiring an independent candidate for president of the United States to file his nominating petition with the Secretary of State by April 1, 1980—approximately five and one-half months prior to the time when, under the law of Maine, political parties were required to certify their nominees for president. Maine, like Ohio, imposed no similar filing burden on partisan candidates for the presidency, but instead "permitt[ed] the names of party presidential electors to be certified to the Secretary of State as late as September 30." 495 F. Supp. at 732, Pet. App. 96a. Concluding that this statutory scheme placed a "substantial and unequal burden . . . upon independent candidates," the District Court held that only a compelling interest could justify that burden. *Id.*

As in Ohio, two interests were asserted by Maine in support of the filing deadline: an interest in treating all candidates equally, and an interest in protecting the integrity of the independent routes to the ballot. As Judge Gignoux found, however, the equality argument was not persuasive in view of the failure to make applicable a similar requirement for partisan presidential candidates. Moreover, Judge Gignoux noted, "the filing deadline plainly was not intended to serve as a disaffiliation requirement and it does not serve that purpose in practice." 495 F. Supp. at 734, Pet. App. 98a. As is the case here, "the deadline is wholly ineffective as a disaffiliation provision. On its face, it does not prohibit candidates affiliated with a political party, like Anderson, from running as independents as long as they meet the deadline. And it does prohibit genuinely unaffiliated candidates from running as independents if they fail to meet the deadline." *Id.* at 734, Pet. App. 99a.

Similarly, in *Anderson v. Morris*, 500 F. Supp. 1095 (D. Md.), *aff'd*, 636 F.2d 55 (4th Cir. 1980), the District Court in Maryland struck down Maryland's filing deadline of March 21, 1981. Relying primarily on equal protection grounds, the District Court rejected any of the justifications offered by the State to support the differential in treatment, including the stated interest in the stability of the two-party system. The District Court specifically rejected the argument that the state filing deadline was intended to "prevent a defeated presidential candidate for party nomination like plaintiff Anderson from disavowing his party candidacy when it falters, disrupting the political process and causing strife within his party by attempting another candidacy as an independent." 500 F. Supp. at 1101. Agreeing with District Courts in Ohio, Maine, and New Mexico, the court concluded that this was not the intended purpose of the filing deadline but was rather met by the sore loser provision.[20]

[20] In Maryland, as in Ohio, a "sore loser" provision had been enacted by the state legislature specifically to address this interest by precluding the candidacy as an independent of a person who had

The Fourth Circuit affirmed this decision in a *per curiam* opinion issued after full briefing and argument. 636 F.2d 55 (4th Cir. 1980). While affirming "primarily on the opinion of the District Court," the Court of Appeals went on specifically to note that a major party nominee need "never make any application or file any declaration for candidacy." 636 F.2d at 56-57; Pet. App. 103a. It concluded that it was manifest that Maryland imposed harsher restrictions on an independent candidate for the presidency than on the candidate of a major party and accordingly that the restriction must at the least be justified by reference to a substantial state interest—a standard that it found the State had not met.

While it is surely true that the validity of an early filing deadline may vary, depending on the nature and structure of other provisions of state law and the purposes which that deadline is intended to serve, it is plain that the decision below is in irreconcilable conflict with the decision of two other Courts of Appeals. In all three cases the district courts found a discrimination in that presidential party candidates were not required in any way to file or declare early and the deadlines struck down; and in two of the three cases very similar or identical justifications offered by the states were rejected by the District Courts, and Courts of Appeals. This Court should grant certiorari to reverse the judgment below and eliminate this inconsistency.

III. The Decision Below Reflects a Serious Misunderstanding of the Reach of this Court's Summary Affirmances

The Court below appeared to conclude that this Court's summary disposition of appeals in *Pratt v. Begley*, 352 F. Supp. 328 (E.D. Ky. 1970), *aff'd*, 409 U.S. 943 (1972) and *Sweetenham v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd*, *sub nom. Sweetenham v. Gilligan*, 409 U.S. 942 (1972), "answers appellees' first amendment chal-

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unsuccessfully participated as a partisan candidate in the State's presidential primary. In each case, however, it was conceded that the sore loser ban did not bar Anderson's candidacy.

lenge to Ohio's filing deadline," Pet. App. 12a, although it acknowledged that this was "a slender reed" on which to rest decision. Both the confusion expressed by the Sixth Circuit on this issue, as well as its erroneous conclusion as to the reach of this Court's decisions in *Pratt* and *Sweetenham*, demonstrate the need for this Court's guidance.

The Court below paid lip service to the proposition that "summary dispositions . . . extend only to the 'precise issues presented and necessarily decided by those actions,'" *Metromedia, Inc. v. City of San Diego*, 101 S.Ct. 2882, 2888 (1981), quoting *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), and that "[t]he precedential significance of the summary action . . . is to be assessed in the light of all of the facts in the case." *Mandel v. Bradley*, 432 U.S. at 177. This certainly should be the governing principle. Indeed, this Court has had occasion more than once in dealing with ballot access decisions and the lower courts' reading thereof to emphasize that, "A summary disposition affirms only the judgment of the court below . . . and no more may be read into [the Supreme Court's action] than was essential to sustain that judgment." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. at 182-83.

Proper application of these principles compels the conclusion that the Court of Appeals erred in its reading of *Sweetenham* and *Pratt*. In both *Sweetenham* and *Pratt*, independent candidates for Congress and for governor challenged respectively Ohio's then-early February filing deadline and Kentucky's March 31 filing deadline. Plaintiffs in *Sweetenham* were denied relief on the equitable grounds that they had not tendered nominating petitions to state officials "at or before the time Ohio requires political parties to choose their nominees," 318 F. Supp. at 1273, and indeed, took no steps to declare their candidacies until *after* the party primaries had chosen the partisan candidates. In *Pratt*, while the court purported

to decide the reasonableness of Kentucky's March 31 filing deadline, it indicated that its dismissal of the complaint was based at last in part on the plaintiff's failure to file any signatures until August 12, which had, in turn, forced the court to decide in just a few days on the validity of the legislative enactment.[21]

In both cases it appears that equitable relief was denied at least in part because the plaintiffs had been so tardy that they were not equitably entitled to relief. Since a summary affirmance affirms only the judgment below, and not necessarily the reasoning, the summary affirmances of these cases should extend no further than required by the very limited facts presented.

Moreover, neither *Sweetenham* nor *Pratt* even presented the questions posed here, where the early primary filing deadline is applied to an independent presidential contender, whose partisan opponents are *not* chosen at the

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[21] Thus, after noting a presumptive reasonableness in requiring an independent candidate to file nominating petitions simultaneously with those required of the partisan contenders for the same office (a situation not presented where the office in question is that of the Presidency), the three-judge court observed that:

> "This court is being asked to strike down a solemn legislative enactment made presumably after committee hearings, examinations of various geographical locations, and the other things that go into the establishment of fixing election laws. It would be impossible for this court, in the course of several days, on the sole basis of briefs and oral arguments, to adequately delve into the manifold purposes of a statute, the propriety of which has been scrutinized by the legislature at each step of the law making process."

352 F. Supp. at 330. The judgment and order entered is entirely consistent with the proposition that the particular plaintiff there was not entitled to equitable relief, since so far as the reported decision indicates, the complaint was dismissed without any judgment being entered for the State in favor of the constitutionality of the statute. Similarly, in *Sweetenham* no order adjudging the filing deadline to be constitutional appears to have been entered or to have been before this Court. 318 F. Supp. 1274.

primary but at nominating conventions bearing only a tangential relationship to any given state's primary.[22] *A fortiori*, then, the cases could not have resolved the instant matter.

Notwithstanding the limited nature of summary affirmances, the Court of Appeals relied on an unprecedented theory relating to the *time* when this Court acted in resolving the appeals in *Sweetenham* and *Pratt* to conclude that a far broader reading should be given to the Court's action than is suggested by the decisions themselves. The Court of Appeals reasoned as follows:

> "Had the Supreme Court affirmed *Pratt* and *Sweetenham* before the November 1970 elections, the precedential effect of its action would pretty clearly be limited to a determination that equity did not demand that plaintiffs in those cases have a place on the ballot in view of their late filing. However, the Supreme Court did not affirm until almost two years after the 1970 elections. At that time, any claim for equitable relief and any decision based on the equities asserted by these parties was long since mooted. Therefore, the only purpose we can find to the court's action in 1972 was to settle the constitutionality of Ohio's and Kentucky's filing deadlines for future elections."

Pet. App. at 10a. The Court of Appeals opinion thus suggests, contrary to settled precedent, that this Court had some discretionary jurisdiction comparable to the certiorari jurisdiction to dispose of the appeals before it. The only judgments before this court in either *Pratt* or *Sweetenham* were those in fact entered by the District Courts, neither of which purported to declare against all challenge the constitutionality of the filing deadlines.

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[22] As the District Court in this case said, "What is at issue in this case is the State's power to demand that an independent candidate reach a decision about whether to run months before a primary in which he does not take part, and the State's power to require this of him when it is not required of all partisan candidates." Pet. App. 51a.

See n.21, *supra*. Neither case presented the precise claim at issue here, and in both cases there was a substantial basis for concluding that the particular plaintiffs were not equitably entitled to invoke the Court's jurisdiction to strike down the filing deadlines because of their failure to act until after the primaries. This Court's summary affirmances can properly be read to extend no further than that conclusion. The decision below to the contrary is erroneous and should be rectified by this Court.

IV. The Decision Below Involves Important and Recurring Constitutional Questions and Presents an Appropriate Vehicle for Resolving Such Questions in a Deliberate and Considered Fashion

The importance of the issues involved here needs little elaboration. This Court's decisions have established that, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Indeed, "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964). Unreasonably early filing deadlines for independent presidential candidates infringe on the associational and voting rights of those members of the American electorate who identify themselves as independent or who are dissatisfied with the choices presented by the major parties. As petitioners demonstrated in the District Court, this portion of the electorate has grown substantially in the last twenty years.

The presidential election, moreover, is unique. Restrictions on access to the ballot for independent candidates for that office intrude upon the integrity of the system by which the nation selects its only truly national leaders. The President and Vice President alone are elected by all

the people, concentrating "power . . . in a single head in whose choice the whole nation has a part." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J., concurring). Only in the presidential election are the voters of each state inextricably bound to the voters of every other state in the determination of a single, nationwide outcome. If one, or a tiny handful of states, can deny a serious independent candidate with substantial nationwide support like petitioner Anderson a meaningful and equal chance to compete for election, then the process by which our democracy works and the rights of the people to exercise their free choice to select those who will govern them are demeaned. Whatever latitude the Constitution gives each state in regulating the process by which its own officials and representatives to the Federal Government are elected, the situation is necessarily different in a national presidential election where each state's regulation works to shape not only its own electoral process but, in combination with the several states, to select a President and Vice President.[23]

Petitioners argued in the District Court and now urge this Court to grant certiorari to consider whether Ohio's

[23] The interests of any single state in excluding from its ballot serious independent candidates are necessarily less forceful when asserted in the context of the national presidential election than when asserted in the context of elections for state-wide or local office. A state's interest in forcing early choices of different routes to the ballot for an office for which the contenders will in fact be selected at that state's primary is necessarily greater than where the primary in question is only one, small, non-binding aspect of a national selection process. Indeed, this Court only recently observed that "Any connection between the process of selecting electors and the means by which political party members in a state associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance." *Democratic Party of the United States v. LaFollette*, 450 U.S. 107, 125 n.31 (1981). Thus, interests advanced by a state in requiring an independent presidential candidate for the general election to qualify for the ballot at the same time that delegates for election to the party nominating conventions qualify simply cannot be regarded as compelling.

unreasonably early filing deadline is so out of line with the requirements of other states as to conflict with the provisions in Article II, § 1 that permit *Congress* to choose the date on which the electors cast their votes and require such date to be "uniform" throughout the United States. See Questions Presented, supra at i. While the states admittedly have considerable latitude in designating the manner of appointment of electors, this Court has long since established that such power must be exercised so as not to violate other provisions of the Constitution. *Williams v. Rhodes, supra*, 393 U.S. at 29; *Ray v. Blair*, 343 U.S. 214, 227 (1952). Thus, when a state seeks to require independent candidates for our only national elective office to enter that process well in advance of the time required by most other states, and well in advance of when the national political parties finalize their selection, the constitutionally recognized interest in a unified and cohesive national presidential seelction process is placed in jeopardy.

The decision below will permit a single state to interfere with this national process, through its insistence upon an unusually early and discriminatory filing deadline for independent presidential candidates that no court has found to be necessary to further compelling state interests. In view of the evident importance of presidential elections, as well as the constitutional rights asserted by all petitioners, this Court's review is plainly warranted.

CONCLUSION

Although Petitioners submit that this Court's decisions have been clear with regard to the standard for review of ballot access restrictions substantially burdening fundamental rights, the decision below manifests a substantial confusion about what that standard is and refers to other cases in which a similar confusion is said to be apparent. This case provides an appropriate opportunity for this Court to clarify what its own prior decisions

seem so clearly to indicate. Challenges to state ballot access requirements often arise in the heat of an election, when normal appellate procedures may be foreshortened or bypassed. Here, however, this Court may resolve the important constitutional questions posed by the decision below and do so in a deliberate and considered fashion.[24]

For all of the foregoing reasons, Petitioners respectfully submit that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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[24] It is well-established that issues of this sort, being capable of repetition yet evading review, do not become moot once the election is held. *See, e.g., Storer v. Brown, supra*, 415 U.S. at 737 n.8.

Appendix

81-1635

No.

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN B. ANDERSON, GEORGE H. HETRICK, LESLIE LAUFMAN, M.D., GERALD M. EISENSTAT,
Petitioners,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of Ohio,
Respondent.

APPENDICES TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 80-3513

JOHN B. ANDERSON, ET AL.,
Plaintiffs-Appellees,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of the State of Ohio,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Ohio, Eastern Division

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Decided and Filed November 4, 1981

Before: ENGEL, KENNEDY and MARTIN, Circuit Judges.

KENNEDY, Circuit Judge. Ohio requires independent candidates for the Presidency to file a statement of candidacy with the Secretary of State some seven and one-half months before the general election in November. Partisan candidates for President are required to file at the same time in order to run in Ohio's preferential primary. Political parties are permitted to choose their presidential candidates as late as the middle of August. The District Court for the Southern District of Ohio held that the early deadline for independents violates the first amendment and

equal protection rights of appellees, an independent presidential candidate and his supporters.[1] The Secretary of State of the State of Ohio appeals. We find Ohio's laws to be within the limits set by the Constitution and reverse.

On June 8, 1979, Congressman John B. Anderson, Jr. of Illinois began his campaign to become the Republican Party candidate for the Presidency in the November, 1980 general election. Between June 9, 1979 and April 24, 1980, he raised over $7,700,000 and arranged to appear in 27 Republican primaries, actually appearing in nine. The results of these nine primaries showed that Anderson's attempt to become the Republican party nominee was doomed to failure. On April 24, 1980, Anderson announced that he would instead campaign as an independent. He requested those states in which he was still scheduled to appear in a Republican primary, including Ohio, to remove his name from the primary ballot, and began the formidable task of complying with the various state requirements for placing an independent candidate's name on the November general election ballot.

Ohio offers alternative routes to the general election ballot. Candidates who pursue the independent path are governed by Ohio Rev. Code § 3513.257, which requires that a statement of candidacy and nominating petitions bearing the signatures of 5,000 qualified voters be filed by the 75th day before the first Tuesday after the first Monday in June immediately preceding the general election. Thus, Congressman Anderson had to have filed no later than March 20, 1980 in order to appear on the November, 1980 general election ballot. Candidates who chose instead to vie for a political party's nomination for the Presidency by seeking delegates to the national convention in Ohio's June primary had to file, also by March 20, a declaration of candidacy and nominating petitions bearing signatures from 1,000 members of the candidate's party. Ohio Rev. Code § 3513.05.

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[1] The District Court's decision is reported at 499 F. Supp. 121.

Political parties must earn the right to field presidential candidates by complying with Ohio Rev. Code §§ 3513.01 and 3517.01. Parties that captured at least 5% of the vote in the last preceding gubernatorial or presidential election are automatically entitled to a spot on the general election ballot. New or small political parties are required to file 120 days before the primary election a statement of intent to participate in the June primary, plus nominating petitions signed by qualified electors equal to 1% of the number of electors who voted in the last gubernatorial or presidential election. Hence, a new party's nominating petitions had to bear approximately 28,000 valid signatures, 23,000 more than required for an independent candidate, and be filed by February 4, 45 days earlier than an independent candidate was required to file.

Ohio does not require that the person ultimately chosen as a political party's presidential nominee have participated in the state's June primary. Thus, while an independent must declare his candidacy by March 20, theoretrically at least a partisan candidate need take no action and make no commitment until after his party's convention (or 75 days before the general election in the case of a minor political party—Ohio Rev. Code § 3505.10). As a result, the *official* deadline for a partisan candidate's announcement is approximately five months after an independent must declare his or her candidacy.

Anderson gathered approximately 16,000 signatures for his nominating petitions in Ohio between May 10 and May 15. He tendered the nominating petitions and a statement of candidacy to the Secretary of State's office on May 16, but appellant refused to accept them or to put Anderson's name on the ballot solely on the ground that the petitions and statement were not timely filed under section 3513.257.

Anderson brought this action on May 19, challenging the March 20 filing deadline for independent candidates as

a violation of the first and fourteenth amendments. Also named as plaintiffs were a registered voter in Ohio who wished to cast her vote for Anderson in the 1980 general election; a registered voter in New Jersey who feared that the value of his vote for Anderson in the general election would be diminished if Anderson were ineligible for Ohio's electoral votes; and an individual who desired to appear in the general election as an elector pledged to Anderson.

In a thoughtful opinion the District Court found that by excluding Anderson from the general election ballot Ohio's early filing deadline substantially burdened appellees' first amendement and fundamental rights by: (1) preventing Anderson from using his political campaign in Ohio as a means of disseminating ideas; (2) preventing Anderson and those who would vote for him from associating to advance their political beliefs by denying them the opportunity to vote for the candidate of their choice; (3) restricting the right to vote of those who would vote for Anderson in Ohio; (4) diluting the voting rights of Anderson voters in other states by denying their candidate access to the sixth largest pool of electoral votes in the country. The District Judge noted that the burden on constitutional rights was all the greater because of the large amount of support that Congressman Anderson enjoyed in Ohio and nationwide. The District Court also found that requiring independent candidate's to declare their candidacy in March, but not mandating like action by partisan candidates until after their party's nominating convention, invidiously discriminated against independent candidates.

The District Court ruled that only a compelling interest could justify this burden on appellees' first and fourteenth amendment rights. Ohio argued that the deadline advanced its interest in political stability, by forcing potential independent candidates to disaffiliate themselves from

political parties at an early date, thus preventing candidates from doing exactly what Anderson did here—beginning a power struggle within their party, then carrying that struggle on as independents once it became clear that they would not be successful within the party.

The District Court accepted the interest in political stability as compelling, and recognized that in the context of state elections the Supreme Court has approved disaffiliation requirements to accomplish this goal. *Storer* v. *Brown*, 415 U.S. 724 (1974). However, the District Court held that the March 20 filing deadline acted as a disaffiliation provision only by happenstance, where an independent candidate who sought to file after March 20 had also sought a party nomination. The court noted that Ohio's law would keep off the ballot an independent candidate who filed after March 20 although he never associated with a political party. The court refused to accept the proposition that Ohio's interest in preserving the integrity of political parties through a disaffiliation provision is as great in a national election as in state elections.[2] The District Court also noted that another section of Ohio's election law addressed the same concern that Ohio claimed to be addressing through its early filing deadline. Ohio Rev. Code § 3513.04 contains a "sore loser" provision, which prohibits a candidate from seeking a place on the general election ballot as an independent if that person's name has appeared on the primary elec-

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[2] Although the District Judge did not give his reasons, an explanation is found in *Anderson* v. *Babb*, 632 F.2d 300, 305-306 n.2 (4th Cir. 1980), a decision subsequent to the District Court's ruling. The Fourth Circuit observed that *Storer* recognized the state interest in using a disaffiliation provision to protect the integrity of a direct party primary in state elections that is *binding* on the state. Since a presidential preference primary is not binding on a national political party's choice of a presidential candidate, the court reasoned that the same state interest in disaffiliation to prevent fraud and party raiding does not exist.

tion ballot.[3] The District Court concluded that the filing deadline combined with the existing sore loser provision did not form a rational and narrowly drawn legislative scheme to promote political stability, and accordingly did not warrant the burdens imposed on or the discriminatory treatment of independents. *See also Greaves* v. *State Board of Elections of North Carolina*, 508 F.Supp. 78, 83 (E.D. N.C. 1980) (where a state already has a "sore loser statute, an early filing deadline for independent candidates cannot be considered necessary to accomplish the same goal). On July 17 the District Court granted appellees' motion for summary judgment and a preliminary injunction, ordering that Anderson's name be placed on the general election ballot.[4]

Congressman Anderson's late decision to run as an independent caused him to miss similar early filing deadlines in New Mexico, Maryland, Maine, and Kentucky.[5]

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[3] The parties agree that the sore loser provision did not bar Anderson's candidacy, apparently because his name did not appear on the primary ballot. We note also that section 3513.04 could be construed not to apply to presidential elections.

[4] The Secretary of State filed a notice of appeal. On July 31, appellees moved this Court for an expedited appeal; appellant opposed the motion and it was denied. On August 7 appellant filed a petition for writ of certiorari in the United States Supreme Court, together with a motion to expedite consideration of the petition. On August 15, the Supreme Court denied the motion to expedite, and on September 18 the Court denied the petition for writ of certiorari.

The Supreme Court's denial of certiorari has no impact on our consideration of this case. A writ of certiorari to a court of appeals before that court has entered judgment will be granted only in a case of exceptional public importance. S. Ct. R. 18. Denial of appellant's motion for certiorari means only that appellant did not meet this difficult test.

[5] The Kentucky case, *Anderson* v. *Mills*, 497 F. Supp. 283 (E.D. Ky. 1980), was decided on the basis of state law. An appeal is presently pending in that case before another panel of this Court *sub nom. Greaves* v. *Mills*, Nos. 80-5318/5328.

In New Mexico, Maryland, and Maine, Anderson raised challenges similar to those he raised in Ohio. He prevailed in all three states for substantially the reasons relied on by the District Court in this case. *See Anderson* v. *Morris*, 500 F. Supp. 1095 (D. Md.), *aff'd*, 636 F.2d 55 (4th Cir. 1980); *Anderson* v. *Hooper*, 498 F. Supp. 898 (D. N.M. 1980); *Anderson* v. *Quinn*, 495 F. Supp. 730 (D. Me. 1980), *aff'd*, No. 80-1551 (1st Cir. Sept. 17, 1980).[6] *See also Greaves* v. *State Board*, *supra*, 508 F. Supp. at 82-84 (no state interest justified a late April filing date for independents, but an early June deadline for new parties and a late summer deadline for established parties to pick their candidates); *McCarthy* v. *Kirkpatrick*, 420 F. Supp. 366, 373-375 (W.D. Mo. 1976) (no state interest justified an early April filing date for independents and primary candidates, but a late summer deadline for partisan candidates who did not appear in the primary).

The general election was held during the pendency of this appeal. Anderson appeared on the ballot in all 50 states plus the District of Columbia, and received approximately 7% of the popular vote.

Summary and Sub Silentio Supreme Court Precedent

Appellees make no claim that complying with the 5,000 voter signature requirement alone presents the least

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[6] The Maine filing deadline differed significantly from the Ohio deadline that we face in this case, in that it contained a statement of legislative purpose: "To Make Equal Application of Legal Requirements for Independents, Democrats, and Republicans in all Respects." 495 F. Supp. at 733 n.7. Party candidates for statewide office in Maine secure a place on the general election ballot by winning their party's primary, which they must enter by April 1. Thus, the Main law treated independent and party candidates for statewide office alike. Although, unlike Ohio, Maine has no presidential primary, the statute contained no exception for independent presidential candidates. Thus the statute had the effect of treating partisan and independent presidential candidates differently, in contravention of the stated purpose of the statute.

difficulty. Their position would be the same if Ohio required no nominating petition, but only a statement of candidacy, by March 20. Accordingly, we treat Ohio's law as if it were a simple filing deadline.

We are aware of no opinion of the Supreme Court that has ever directly considered the constitutionality of an early filing deadline standing by itself. Notwithstanding this fact, we must determine whether the Court has held that a March 20 filing deadline is a constitutional impediment to exercise of the first amendment right to ballot access. Appellant contends that this is the effect of the summary affirmance of *Sweetenham* v. *Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham* v. *Gilligan*, 409 U.S. 942 (1972). The inquiry is actually broader than appellant suggests, as the Supreme Court has been asked in several cases to decide on direct appeal whether a filing deadline in March or earlier unconstitutionally burdens first amendment rights.

Sweetenham involved independent candidates for governor and Congress who sought declaratory and injunctive relief from Ohio's then early February filing deadline. The District Court denied relief on the equitable grounds that plaintiffs did not tender a nominating petition to state officials before the deadline or even before filing suit, and took no steps to become candidates before the May primary. *Pratt* v. *Begley*, 352 F.Supp. 328 (E.D. Ky. 1970), summarily affirmed the same day as *Sweetenham*, 409 U.S. 493 (1972), presents similar facts. Kentucky's filing deadline was March 31, 1970. Like the plaintiffs in *Sweentenham*, plaintiff in *Pratt* sought equitable declaratory and injunctive relief placing him on the ballot as a candidate for Congress in Kentucky. Plaintiff was even a poorer candidate for equitable relief than were plaintiffs in *Sweetenham*, as he did not submit a nominating petition until the middle of August before the election. The District Court did not balance the equities, but denied relief on the ground that the filing deadline was

reasonable and therefore constitutional. Plaintiffs in both cases appealed to the Supreme Court.

Appellant here notes that the statement of jurisdiction filed by the *Sweetenham* plaintiffs in the Supreme Court challenged the filing deadline itself as unnecessary to advance a compelling state interest and therefore a violation of the first and fourteenth amendments. Appellant cites *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977): "Summary affirmances and dismissals for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from." Appellant concludes that because the jurisdictional statement in *Sweetenham* raised first and fourteenth amendment challenges to a filing deadline even earlier than the one at issue here, appellees' first and fourteenth amendment claims in this case must also fail.

"Votes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . ." *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959); *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975). "[L]ower courts are bound by summary decisions by [the Supreme] Court '"until such time as the Court informs (them) that (they) are not."'" *Id.* at 344-345. However, the precedential effect of summary action is to be narrowly construed. "[S]ummary dispositions . . . extend only to 'the precise issues presented and necessarily decided by those actions.'" *Metromedia, Inc.* v. *City of San Diego*, 49 U.S.L.W. 4925, 4928 (1981). "A summary disposition affirms only the judgment of the court below . . . and no more may be read into [the Supreme Court's] action than was essential to sustain that judgment." *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182-183 (1979).

In light of the narrow effect to be given summary dispositions, appellant has construed the quoted sentence

from *Mandel* too literally. The Supreme Court was not holding that a summary affirmance decides every issue raised in the jurisdictional statement, but that on the narrow facts before the Court the issues raised in the jurisdictional statement did not warrant the relief sought. To hold otherwise would permit parties appealing cases to the Supreme Court to control the precedential effect of a summary action by the way they structure their jurisdictional statement.

Nonetheless, appellant's conclusion is correct. Had the Supreme Court affirmed *Pratt* and *Sweetenham* before the November 1970 elections, the precedential effect of its action would pretty clearly be limited to a determination that equity did not demand that plaintiffs in those cases have a place on the ballot in view of their late filing. However, the Supreme Court did not affirm until almost two years after the 1970 elections. At that time, any claim for equitable relief and any decision based on the equities asserted by these parties was long since mooted. Therefore, the only purpose we can find to the Court's action in 1972 was to settle the constitutionality of Ohio's and Kentucky's filing deadlines for future elections.[7]

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[7] Two additional summary actions by the Supreme Court merit discussion. The jurisdictional statement in *Auerbach* v. *Mandel*, 409 U.S. 808, *aff'g* Civ. No. 72-141-N (D. Md. 1972), squarely raised the constitutionality of a March 6 filing deadline. But, although the District Court stated in its oral opinion in *Auerbach* that it thought a March 6 deadline reasonable, it clearly did not deny relief on that basis. In addition, the motion to affirm filed in the Supreme Court asserted that the constitutionality of the filing deadline was not properly raised. This uncertain state of affairs precludes us from relying on *Auerbach* to reverse the District Court here.

The Supreme Court dismissed for want of a substantial federal question the appeal in *Ring* v. *Marsh*, 78 F. Supp. 914 (D. N.J.), *appeal dismissed*, 335 U.S. 849 (1948). Plaintiff sought injunctive relief placing him on the ballot in New Jersey's congressional election, though he missed the March 11 filing deadline and did not attempt to file a nominating petition with the state until May 22,

It might also be argued that *Mandel* v. *Bradley, supra*, decided the constitutionality of a March deadline against all first amendment challenges sub silentio. The plaintiff in *Bradley* v. *Mandel*, Civ. No. T 76-638 (D. Md. May 17, 1976), desired to be a candidate in a Maryland congressional election but failed to submit signatures from 3% of the qualified voters by the March 8 deadline. The District Court interpreted *Tucker* v. *Salera*, 424 U.S. 959 (1976), summarily affirming 399 F. Supp. 1258 (E.D. Pa. 1975), as holding that it was an unconstitutional burden to have to submit *any* signatures at such an early date. The Supreme Court held that the District Court had misconstrued the effect of *Tucker*; *Tucker* had not held that it is unconstitutionally burdensome to require candidates to meet *any* March signature requirement, but just the particular signature requirement Pennsylvania imposed in *Tucker*. Pennsylvania required candidates to collect signatures totalling 2% of qualified voters within a three week period ending in March. The Court vacated and remanded with directions to ascertain the difficulty a "reasonably diligent independent candidate" would face in satisfying the requirement.

As a matter of strict logic, there was no reason to remand *Mandel* to determine the difficulty of collecting signatures by March 8 if it were unconstitutional even to require a person to decide whether to run by that date. However, no party argued this position to the Supreme Court or the District Court in *Mandel*. The District

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more than a month after the primary election. The District Court denied relief on the ground that the filing deadline itself was reasonable.

We are unable to distinguish the facts of *Ring* and this case in a meaningful way. However, plaintiff's jurisdictional statement in *Ring* was almost incoherent, and seems only to have argued that the District Court erred by deciding whether plaintiff was entitled to a permanent injunction when all he sought was a preliminary injunction. Therefore, we are reluctant to treat the Supreme Court's dismissal as dispositive here.

Court's opinion, the jurisdictional statement filed by appellants, the briefs for both parties, and *Tucker*, the case relied on by the District Court, all address only the burdens of collecting signatures by an early date, *e.g.*, harsh weather, uninterested voters, and discouraged volunteers. These burdens have little to do with the difficulty of deciding whether to run in March. In fact, plaintiff in *Mandel* had made that decision almost a year earlier. Thus, we cannot say the burden of deciding whether to run by March was actually before the Supreme Court, or that *Mandel* disposes of Anderson's challenge to Ohio's filing deadline.

We conclude that the Supreme Court's disposition of *Pratt* and *Sweetenham* answers appellees' first amendment challenge to Ohio's filing deadline. *Mandel* v. *Bradley* and *Ring* v. *Marsh*, *supra*, n.7, lend support to this conclusion. However, in view of the limited precedential effect to be accorded summary dispositions and our uncertainty over just what the impetus for the Court's decision was in those cases, we regard this as rather a slender reed on which to rest our decision. Thus, we undertake to supply an alternative ground for denying the claim that the filing deadline is too early under the first amendment.

Historical Overview

"Ballot access statutes are not susceptible of easy analysis, nor is the appropriate standard of review always easy to discern." *McLain* v. *Meier*, 637 F.2d 1159, 1163 (8th Cir. 1980). Analysis must begin with the text of the Constitution, which governs presidential elections in Article II, Section 1, Clause 2:

> Each State shall appoint, in such manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative,

> or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The Supreme Court observed in *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892):

> [T]he word "appoint" . . . was manifestly used as conveying the broadest power of determination.

The Court went on to say:

> [T]he appointment and mode of appointment of electors belong exclusively to the states under the Constitution of the United States. . . . Congress is empowered to determine the time of choosing the electors and the day on which they are to give their votes, which is required to be the same day throughout the United States, but otherwise the power and jurisdiction of the State is exclusive, with the exception of the provisions as to the number of electors and the ineligibility of certain persons, so framed that congressional and Federal influence might be excluded.

Id. at 35-36.[8] The only limitation on the states' power to appoint presidential electors is that the power may not be

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[8] *See also Oregon* v. *Mitchell*, 400 U.S. 112, 122 (1970) (opinion of Black, J.), quoting from *Smiley* v. *Holm*, 285 U.S. 355, 366-367 (1932):

> "It cannot be doubted that these comprehensive words [the grant to the states in Article I, Section 4 to control the time, place, and manner of holding congressional elections] embrace authority to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns; in short, to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved. . . ."

We perceive no reason not to accord the word "manner" in Article II the same broad construction.

exercised in a way that violates other express provisions of the Constitution. *Williams* v. *Rhodes*, 393 U.S. 23, 29 (1968).

With the power to appoint presidential electors came corresponding state responsibility for elections. Laws restricting access to the ballot are the result of state efforts to discharge this responsibility.[9]

The first modern Supreme Court case to consider the constitutionality of state ballot access laws was *Williams* v. *Rhodes*, *supra*, which dealt with an earlier and extremely burdensome version of Ohio's election laws. Those laws contained no provision for independent or write-in candidates, and they required new political parties to file, not later than February 7 of the election year, a nominating petition signed by electors totalling 15% of the number of votes cast in the preceding gubernatorial election. Any party that managed to satisfy the signature requirement (none did) would also have had to follow complex and burdensome organizational procedures. The Court later characterized these laws as making it "virtually impossible" for a new party to get on the ballot. *Jenness* v. *Fortson*, 403 U.S. 431, 434-435 (1971). The Court held that only a compelling interest could justify such substantial burdens on "two of our most precious freedoms"—the right to associate for the advancement of political beliefs and the right of voters to vote effectively —falling so unequally on the members of new and small political parties. *Williams* v. *Rhodes*, 393 U.S. at 31. Rejected as not sufficiently compelling were Ohio's interests in the political stability that a two-party political system provides, and in ensuring that the winner of an

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[9] Ballot access was not a problem until the latter part of the nineteenth century, since until that time every political party produced its own ballot. Blackman, THIRD PARTY PRESIDENT? 2 (1976). This system engendered fraud, in turn prompting the states to adopt reforms, among which was the importation of the Australian, or secret ballot. *Id.* State control over the ballot created the need for rules to govern access.

election is in fact supported by the majority of voters, an interest that Ohio advanced by restricting the voters to a choice between the two major political parties. *Id.* at 31-32.

Williams preceded a number of Supreme Court ballot access cases, in addition to the summary actions dismissed above in which the Court let stand every lower court decision that upheld a March filing deadline. In a full opinion the Court upheld a California "disaffiliation provision" for state elections, which prohibited a candidate who failed to disaffiliate from a political party some twelve months before a primary election from running as an independent in the following general election. The Court rested its conclusion on the ground that the law furthered the state's interest in political stability by preventing one party from fielding a candidate to bleed votes from another party. *Storer* v. *Brown, supra*; *See also Rosario* v. *Rockefeller*, 410 U.S. 752 (1973) (upholding a provision that to vote in a party primary, voters had to affiliate with that party at least eleven months before the primary). But, it has struck down a 23-month disaffiliation requirement that effectively tied voters to a given party. *Kusper* v. *Pontikes*, 414 U.S. 51 (1973).

The Court upheld a Georgia requirement that to obtain ballot position new political parties had to file a petition containing the signatures of 5% of eligible voters, plus pay a filing fee equal to 5% of the salary for the office sought. *Jenness* v. *Fortson, supra.* The Court noted the state's "important" interest in requiring candidates to make a preliminary showing of support, 403 U.S. at 442. The Court distinguished *Williams* by noting that the *totality* of the Ohio scheme, which in effect kept all new parties off the ballot, rendered that scheme invalid; by contrast, Georgia did not have an unreasonably early filing deadline (the second Wednes-

day in June, as opposed to February 7),[10] did not require an unreasonably large number of signatures, and did not impose burdensome organizational requirements on those parties that did satisfy its signature requirements.

In other decisions the Supreme Court has twice remanded challenges to signature requirements for consideration of whether a "reasonably diligent candidate" could meet them; once in the context of a presidential election, *Storer* v. *Brown*, *supra* and once in the context of a senatorial race. *Mandel* v. *Bradley*, *supra*. It struck down, as unnecessary to ensure that a candidate is serious, large filing fees in state and local elections. *Lubin* v. *Panish*, 415 U.S. 709 (1974); *Bullock* v. *Carter*, 405 U.S. 134 (1972). Finally, the Court invalidated an Illinois requirement that nominating petitions for elections in Chicago bear signatures of 5% of the qualified voters, significantly more than 25,000, while only 25,000 signatures were required for statewide elections. *Illinois State Board of Elections*, *supra*.

Standard of Review

It appears that after the District Court found that the March 20 filing deadline substantially burdened appellees' constitutional rights, it put the burden on Ohio to demonstrate that the filing deadline was necessary to advance a compelling interest. Appellant argues that this was error, that under *Mandel* and *Bradley* Ohio's filing deadline is constitutional if a "reasonably diligent independent candidate" could comply with the relatively modest 5,000 signature requirement by March 20. Appel-

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[10] Although the Supreme Court in *Jenness* characterized Ohio's February 7 filing deadline as "unreasonably early," that characterization was in conjunction with the difficulty of satisfying a 15% signature requirement by February 7, and is not controlling here. We note also that March 20 is over 40 days closer to the general election than February 7. The Court did not consider the validity of an early deadline to further the interests we find here.

lant notes that several independent candidates did qualify for places on the Ohio ballot in 1980. Thus, appellant concludes that a reasonably diligent candidate could satisfy the requirement, which therefore passes constitutional muster.

We agree with the District Court that appellant has misperceived the relevance of what a "reasonably diligent candidate" is able to do. In both *Mandel* and *Storer* plaintiffs had challenged the signature requirement itself as unconstitutionally burdensome. Prior to both cases, it was already established that the interest served by a signature requirement, guaranteeing that candidates appearing on the ballot enjoy a modicum of community support, was important. *Jenness* v. *Fortson*, 403 U.S. at 442. Thus, the Court's remand in *Mandel* and *Bradley* with directions to determine whether a reasonably diligent candidate could satisfy the signature requirement indicates that, accepting the state's interest as important, the means chosen to effectuate that interest nonetheless may not be too burdensome.

The reasonably diligent candidate test is peculiarly well-suited to weighing the burden imposed by collecting signatures before a given date or within a given time. The test is of limited usefulness in assessing burdens other than the difficulty of collecting signatures. It is no help in assessing the importance of Ohio's interests in the filing deadline itself, interests which are different than those furthered by a signature requirement. The hardships of a filing deadline, standing alone, are not those of persuading eligible voters to sign one's nominating petition. Rather, a candidate is required to make up his mind at an early date whether to participate at all in an election several months hence, before the issues are crystallized, the competition identified and support can be estimated. We agree with the district Court that a candidate's "diligence" has little to do with the severity of this burden.

Nonetheless, appellant is correct that the District Court required Ohio to prove too much. Under the Constitution and the Supreme Court's ballot access cases it is the courts' duty to discern whether a justification can be found for the law in question. *See Storer* v. *Brown*, *supra*, 415 U.S. at 746 (the Supreme Court could not "discern" or "perceive" sufficient state interests to justify the law in question). The state interests furthered must be balanced against the concomitant burden on access to the ballot. If the state law has the effect of granting a monopoly to the existing major political parties, then of course only a compelling interest will satisfy the Constitution. *Williams* v. *Rhodes*, *supra*, 393 U.S. at 31. Lesser burdens can be justified by lesser interests. *See Storer* v. *Brown*, 415 U.S. 743 (only if a state requires a large number of signatures does a court ask whether it has a compelling interest in having candidates collect the signatures within a short time). There is no "litmus-paper test" to separate a valid from invalid ballot access laws. "Decision in this context . . . is very much 'a matter of degree'. . . ." *Id.* at 730 "[N]ot every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review. . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." *Bullock* v. *Carter*, *supra*, 405 U.S. at 143.

We note that in *Illinois State Board of Elections*, *supra*, the Supreme Court's most recent decision in the realm of ballot access laws, the Court placed the burden on Illinois to establish that it was necessary to advance a compelling interest to require candidates to collect more signatures in order to appear on the ballot in City of Chicago elections than to appear in statewide elections. Further, we recognize that some of the Court's language in *Illinois* Board seems to require states to show that *all* ballot access restrictions are necessary to further a compelling interest: "When such vital individual rights are at stake, a State must establish that its classification

is necessary to serve a compelling interest". 440 U.S. at 184. However, we do not think that this language can be divorced from the peculiar facts of the case before the Court—Illinois itself indicated that the signature requirement for Chicago elections was unnecessarily restrictive by requiring a lesser demonstration of support from candidates in statewide elections in which a greater number of voters participated.

Literally applied, the language of *Illinois Board* would require a state to justify by a compelling interest every departure from the least restrictive ballot access law in the nation. Not only is this inconsistent with the broad power the Constitution grants to the states to choose presidential electors, a power that creates a presumption in favor of the state regulation, it is inconsistent with Supreme Court opinions that approve varying signature and disaffiliation requirements.[11] The 5% signature requirement in *Jenness* was very significantly higher than that of most states. As the Court noted in *Williams* v. *Rhodes*, 393 U.S. at 33 n. 9, as of 1968 42 states had a signature requirement of 1% or less. Georgia's interest in the signature requirement was described in *Jenness* as "important," not compelling, 403 U.S. at 442, and the 5% requirement was upheld although Georgia made no attempt to demonstrate that it was "necessary" to have a much stiffer signature requirement than sufficed in other states. Yet, the opinion in Illinois Board not only did not explicitly overrule *Jenness*, it cited *Jenness* with approval. 440 U.S. at 185. Similarly, if the states always bear the burden of showing that their laws are the least restrictive means to their ends, there should have been no remand to weigh the burden of the signature requirements

[11] A good discussion of the difficulties and inconsistencies that result when reliance on conclusory language such as "strict scrutiny" or "compelling interest" is substituted for the hard judgments that courts are called upon to make when constitutional rights are in issue appears in *Joseph* v. *City of Birmingham*, 510 F. Supp. 1319 (E.D. Mich. 1981) (Pratt J.).

in *Mandel, supra*, and *Storer, supra*, which were also cited with approval in *Illinois Board*, 440 U.S. at 182, 184.

Filing Deadline

The above authorities considered together persuade us that Ohio's March 20 filing deadline does not violate either the first amendment or the equal protection clause of the fourteenth amendment. Ohio's early deadline ensures that voters making the important choice of their next president have the opportunity for a careful look at the candidates, a chance to see how they withstand the close scrutiny of a political campaign.

The importance of this interest was made clear at the Constitutional Convention in 1787, where the delegates debated extensively the means of selecting the President. The alternatives that received the most attention in the early debates were appointment by the national legislature and election by the people at large. The former would have made it impossible to guarantee an independent executive. Election by the people was also disfavored, in part because of concern over the ignorance of the populace as to who would be qualified for the job. Other proposals included selection of the President by state executives; selection by electors chosen by electors chosen by the people. (Hamilton's suggestion); selection by electors chosen by the state legislatures. *See generally* Prescott, DRAFTING THE FEDERAL CONSTITUTION 564-624 (1941).

The present Article II, Section 1, Clause 2 is the resulting compromise. "The [Electoral] College was created to permit the most knowledgeable members of the community to choose the executive of a nation whose continental dimensions were thought to preclude an informed choice by the citizenry at large." *Williams* v. *Rhodes*, 393 U.S. at 43-44 (Harlan, J., concurring) (footnote omitted). At the same time, it was thought that the College would be incapable of exercising any continuing influence over the person selected.

The responsibility for ensuring careful selection of the President passed to the states with the adoption of Article II, Section 1. The need for careful selection has not diminished over the years.

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

Buckley v. *Valeo*, 424 U.S. 1, 14-15 (1976).

"The importance of the [the President's] election and the vital character of its relationship to and effect upon the welfare and safety of the whole people cannot be too strongly stated." *Burroughs* v. *United States*, 290 U.S. 534, 545 (1934). When the states delegated the selection of electors to the people at large, the concerns voiced at the Constitutional Convention about the public's ability to vote intelligently became the states' concerns.[12]

To be sure, some of the impediments to an informed electorate that existed in 1787 have been removed by our extensive present day communications network, through which news of a candidacy is transmitted nationwide virtually simultaneously with its announcement. However, rapid communication can only inform the electorate of the existence of a candidacy. Equally crucial to a meaningful vote is the electorate's ability to evaluate those who would be President once aware of their desire to fill the post. Ohio may very reasonably conclude that requiring presidential candidates to be in the public eye for a significant time materially advances its interest in

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[12] In fact, the first ballot access restrictions were enacted in the beginning of this century to foster rational voting by uncluttering the ballot. Elder, "Access to the Ballot by Political Candidates," 83 Dickinson L. Rev. 387, 389-390 (1979). Cluttered ballots are no longer a problem, *Williams* v. *Rhodes*, 393 U.S. at 33, but the state interest in fostering intelligent voting remains.

careful selection. *See Pratt* v. *Begley, supra*, 352 F. Supp at 330. We also find *CBS, Inc.* v. *Federal Communications Commission*, 49 U.S.L.W. 4891 (1981), holding that the FCC could require broadcasters to provide equal access to political parties eleven months before the general election, indicative of an interest in giving voters information at an early date. Ohio has advanced this interest to the extent that it can within the party system by requiring independent and substantially all partisan candidates to file by March 20.

Ohio has a related interest that is furthered by the March 20 filing deadline. In an election year a voter must decide whether to lend financial support or volunteer effort to a candidate (and if so, to whom) and whom to vote for in the primary. Ohio has an interest in helping its voters make informed choices about where to allocate their support. The March 20 filing deadline for independent candidates and those partisan candidates who appear in the primary, coupled with the February 4 filing deadline for political parties, informs the voters by a date certain of most of their options, with the possible exception of partisan candidates who do not appear in Ohio's primary but nontheless seek their party's nomination. *But see Salera* v. *Tucker, supra*, 399 F. Supp. at 1267-1268 (the state interest in informing the electorate who the independent candidates are does not justify an early filing deadline, especially since it cannot be known at that point who the major party candidates will be).

It is not enough, however, to say that Ohio has interests in ensuring that its voters make a well-considered choice for President. Ohio's law must rationally further those interests, and they must be strong enough to justify the burden imposed by a deadline some seven and one-half months before the general election. Deciding how much time the voters need to examine presidential candidates necessarily involves difficult problems of line drawing. That fact and the extent of the power the

Constitution grants to the states to choose presidential electors counsel us to give a good deal of deference to the date that Ohio has selected.[13]

Moreover, we do not think the burden of meeting Ohio's filing deadline is as great as the District Court described it. The District Judge examined only the burden on Anderson and his supporters, a burden which was certainly large, for Anderson missed the deadline. While the impact of ballot access laws on Anderson himself is a factor, the underlying rationale of the "reasonably diligent candidate" test of *Mandel* v. *Bradley*, *supra*, and *Storer* v. *Brown*, *supra*, is that the burden of ballot access laws is not assessed solely from the perspective of the excluded candidate. *Cf. Williams* v. *Rhodes*, 393 U.S. at 34: "[T]he number of voters in favor of a party, along with other circumstances, is relevant in considering whether state laws violate the Equal Protection Clause."

Recognizing that an early filing deadline requires a candidate to decide whether to run before the issues have crystallized and before he can know the extent of his support, we do not think that the impact on the class of independent candidates of having to decide by March 20 whether to seek the Presidency is very large.[14] *Cf. Storer* v. *Brown*, 415 U.S. at 734 (the state interest in preserving the integrity of state elections justified requiring independent candidates to anticipate their candidacy a full year before the *primary* election). It is little enough to

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[13] We also note that the effect of limiting the states' discretion would be to require uniformity thus compressing the signature gathering and campaigning requirements in the various states. This would greatly increase the burden on all candidates, who may presently devote their scarce resources to a few states at a time.

[14] In this regard, we note that no less than five independent candidates were apparently able to satisfy Ohio's criteria and appear on the presidential ballot in the 1980 election. If further appears that the number of independent candidates in Ohio in 1980 was not unusual.

ask of a person seeking one of the most powerful and influential posts on earth that he make up his mind whether to run seven and one-half months before the election. In point of fact, most serious candidates will have made a decision by that time, and to that extent a state requirement that the decision be made by March 20 is even less of a burden.[15] Viewed in that light, the March 20 filing deadline would for the most part screen out candidates in Anderson's position—those who decided to run, but did not decide early enough what form their candidacy should take. The Constitution does not require Ohio to alleviate the difficulty of choosing among alternate routes to the ballot.

The next question is whether, although Ohio's laws further important state interests, they are irrational means to those ends because they do no exclude from the general election ballot partisan candidates chosen at their party's convention who did not run in the primary. This question is closely intertwined with appellees' equal protection claim, that by not also formally excluding all partisan candidates who do not file by March 20, Ohio's election laws invidiously discriminate against independent candidates for the presidency.[16]

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[15] The District Court in this case, as well as the District Court in *Anderson* v. *Morris, supra,* 500 F. Supp. at 1098, discounted the relevance of the fact that most candidates make a decision before March 20. However, a statutory classification "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." *Pullman Co.* v. *Knott,* 235 U.S. 23, 26 (1914).

[16] It is suggested that the Supreme Court's failure to adopt Justice Stevens' dissent in *Mandel* v. *Bradley, supra,* disposes of appellees' equal protection claim. We do not think so. The District Court in *Mandel* was faced with a Maryland law that required independent candidates for statewide office to file a nominating petition containing the signatures of 3% of the qualified voters 230 days before the general election. Plaintiff in that case challenged the law *inter alia* as a violation of equal protection, in that a partisan candidate was not required to take any action other than to file a statement of

Before we can determine that a state's laws irrationally and invidiously discriminate between classes, it is necessary to determine whether or not the classes are alike in the relevant respects. The comparison between independent candidates and either political parties or political party candidates is a particularly difficult one. As the District Court noted, independent candidates are obviously not the same as either political parties or partisan candidates. It is much harder to move beyond the obvious and to come to

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candidacy 230 days before the general election, while an independent candidate had to have a nominating petition containing 51,155 signatures filed by that date. In order to comply with the signature requirement, plaintiff charged, an independent candidate was required to gear up his political machinery far in advance of the filing date, and was thus required to decide whether to run well before a partisan candidate was. The District Court did not decide the case on this basis. Rather, it considered itself bound to find the early filing deadline unconstitutional by the Supreme Court's summary affirmance in *Tucker* v. *Salera, supra.*

The Supreme Court remanded with instructions to assess the burden of complying with the filing deadline on the ground that the case was not controlled by *Salera.* The Court never discussed the equal protection issue, but Justice Stevens dissented on the basis of plaintiff's equal protection argument.

We do not construe the Supreme Court's action in *Mandel* as a rejection of the equal protection argument that appellees make here. The Court did not clearly reject the equal protection claim. It would be necessary to assess the burden of complying with the filing deadline as per the Court's instructions to decide the equal protection claim raised by plaintiff in *Mandel,* since plaintiff argued that this burden caused an invidious discrimination. More importantly, the equal protection argument raised in *Mandel* is different than the one made by appellees here. Appellees do not claim that they were denied equal protection because complying with Ohio's 5000 signature requirement forced them to make a decision earlier than any partisan candidate. They claim that they were discriminated against because although independent candidates had to decide whether to run at the same time as partisan candidates who wished to appear in Ohio's primary, Ohio did not require partisan candidates to appear in the primary, and thus did not require them to decide whether to run by March 20.

grips with the ways in which independent candidates are like and unlike political parties and their candidates, and how these likenesses and differences are relevant to this case.

The District Court ruled that for the purposes of Ohio's filing deadline independent candidates were very similar to partisan candidates, in that to a great extent the success of both depends upon the appeal of the individual, independent of support from any party structure. Accordingly, the court held that the two classes could not be treated so differently in terms of a filing deadline as Ohio treats them here. It is true that the success of an independent candidate depends on his appeal as an individual. Personal appeal is all he has to offer. However, the same cannot be said of a partisan candidate. While the success of the Republican candidate vis'-a-vis' the Democratic candidate may depend to a significant extent on the personal appeal of each, that is only because in large part the efforts of the competing party structures balance each other out. The contest between the Republican candidate, for example, and the various third party and independent candidates *is* determined largely by party structure, not individual appeal. A party candidate's success is an amalgam of individual appeal and the party's appeal. Thus, independent and partisan candidates are not so similar as the District Court believed.

Further, there are differences between independents and partisans that are relevant to the rationality of Ohio's classification. While laws restricting the right of independents to appear on the ballot affect only independents, laws restricting access for partisan candidates affect not only the candidates but also the parties. Political parties have an existence separate from any individual they may sponsor as presidential candidates. The party has an interest of its own in being free to select the best candidate it can find to advance its views. *See Cousins* v. *Wigoda*, 419 U.S. 477 (1975) (Illinois could

not force the Democratic Party to seat delegates at its national convention): "The Convention services the pervasive national interest in the selection of candidates for national office, and this national interest is greater than any interest of an individual State." *Id.* at 490. *See also Democratic Party* v. *La Follette*, 49 U.S.L.W. 4178 (1981) (a state which conducts an open primary cannot protect the primary results by requiring state delegates to the party convention to vote in accordance with those results): "[A political party] has a substantial interest in the manner in which the delegates to its National Convention are selected." *Id.* at 4183.

By earning for themselves a place on the ballot prior to February 4, political parties in Ohio earned the right to name persons at a later date to occupy that place. Properly understood, the provision that partisan candidates may run in the general election without running in the primary does not create a right for partisan candidates at all. It is a right of political parties, with rather an incidental effect on partisan candidates. If this flexibility affords political parties some advantage over independent candidates, the advantage is counterbalanced by the more stringent qualification requirements parties must meet. By contrast, the independent's candidacy has no existence apart from that of the candidate, and no interest in flexibility in choosing its nominee. While the independent candidate has the same interest as the partisan candidate in being able to make a late decision, he has no interest or right comparable to that of the political party.

Further, all that the voters know about an independent candidate comes from their knowledge of him as an individual. The same is not true of partisan candidates. In broad outline, a voter knows a significant amount about, for example, the Communist, the Libertarian, or the Democratic party candidates if he knows about the parties they will represent. If Ohio's goal is an informed elect-

orate, this difference between independents and parties justifies some difference as to when each type of candidate must announce his bid for office.

Ohio's election laws reflect these differences in a permissible manner. Independent candidates need not satisfy the stricter filing requirements applicable to political parties. On the other hand, they must file much earlier than a partisan candidate who does not run in Ohio's primary, a reflection of the facts that the vast majority of partisan candidates file at the same time; that the voters have less a priori knowledge about independents than about partisan candidates; and that political parties have a legitimate interest in not having to announce all of their potential candidates at an early date, an interest which does not exist with independent candidates.

Thus, we find that Ohio's laws do not impermissibly discriminate against independent candidates, and are designed rationally to further sufficiently important state goals, even when we examine the filing deadline standing apart from the remainder of Ohio's election laws. Assuming that there *is* some discrimination in this one aspect of Ohio's election laws, we are still not persuaded that the March 20 fiilng deadline plus the 5,000 signature requirement make an independent candidate's route to the ballot more burdensome than is the route that must be followed by a partisan candidate. *Cf. Jenness* v. *Fortson*, *supra*, 403 U.S. at 438-441. If anything, compliance with Ohio's requirements for independent candidates is easier than winning a political party's nomination.

Accordingly, the judgment of the District Court is reversed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 80-3513

Filed Nov. 4, 1981

JOHN B. ANDERSON, GEORGE H. HETRICK,
LESLIE LAUFMAN, M.D., and GERALD M. EISENSTAT,
Plaintiffs-Appellees,

vs.

ANTHONY J. CELEBREZZE, JR.,
SECRETARY OF STATE OF THE STATE OF OHIO,
Defendant-Appellant.

Before: ENGEL, KENNEDY and MARTIN, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the United States District Court for the Southern District of Ohio and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed.

Each party to bear its own costs on this appeal.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

A True Copy.

Attest:

/s/ Gary MacCarthy
Deputy Clerk

Issued as Mandate: March 2, 1982

COSTS: None

Filing fee .....$
Printing $

Total $

APPENDIX B

UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case Number: C-2-80-400

Filed Jul. 10, 1980

JOHN B. ANDERSON, *et al.*,

v.

ANTHONY J. CELEBREZZE, JR.,

JUDGMENT

This action came on for consideration before the Court, The Honorable Robert M. Duncan United States District Judge, presiding. The issues having been duly considered and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED THAT: the motion for summary judgment of defendant Anthony J. Celebrezze, Jr., is DENIED: the motion for preliminary injunction of the plaintiffs is now moot and is therefore DENIED; and plaintiffs' motion for summary judgment is GRANTED. It is ADJUDGED and DECREED that R.C. 3513.257, as applied to plaintiffs Anderson and Hetrick, is violative of plaintiffs' rights to political association under the First and Fourteenth Amendments to the United States Constitution, and is violative of plaintiffs' rights to equal protection under the Fourteenth Amendment to the United States Constitution. Judgment is entered for the plaintiffs. It is hereby ORDERED that the defendant Secretary of State accept and process the plaintiffs' petition and other documents as if timely filed under R.C. 3513.257. It is further ORDERED that the defendant cause Anderson's name to

appear on the Ohio ballot in the November 4, 1980, presidential general election, if aside from R.C. 3513.257 he has otherwise met the requirements of Ohio's election laws.

Approved for Entry /s/ Robert M. Duncan
United States District Judge

Dated at Columbus, Ohio this 13th day of July, 1980.

JOHN D. LYTER, Clerk

By: /s/ Jesner
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. C-2-80-400

JOHN B. ANDERSON, *et al.*,
Plaintiffs,

v.

ANTHONY J. CELEBREZZE, JR.,
Defendant.

OPINION

Plaintiff John B. Anderson is an independent candidate for the office of President of the United States. He declared his independent candidacy on April 24, 1980. On May 16, seeking to place his name on the November ballot in Ohio, Anderson tendered to defendant Anthony J. Celebrezze, Jr., Secretary of State of Ohio, those documents required by Ohio law to effect Anderson's nomination as a candidate for that office. The defendant rejected Anderson's filing, citing as the sole ground therefor Anderson's failure to file by the deadline set by Ohio Revised Code (R.C.) § 3513.257. That deadline requires an independent to file his nomination papers 75 days before the primary election in June.

In this election year, the filing deadline falls on March 20, 1980, some 229 days prior to the general election. Upon the rejection of his nominating petition, plaintiff Anderson and three of his supporters filed this lawsuit seeking injunctive relief to place his name on the ballot as well as a declaration that R.C. 3513.257 operates to vio-

late the constitutional rights of Anderson and of electors and voters supporting him in Ohio and across the nation.

Jurisdiction is invoked pursuant to Article II, § 1, Article VI, and the First, Fifth and Fourteenth Amendments of the Constitution of the United States; 28 U.S.C. §§ 1331, 1343(3), and 2201-02; and 42 U.S.C. § 1983.

The case is before the Court on the parties' cross-motions for summary judgment and on plaintiffs' motion for preliminary injunction. The parties have submitted this case on a lengthy stipulation of facts which is appended to this opinion. Following an expedited briefing schedule, the matter was argued to the Court on June 26, 1980. Because there appears to be no genuine issue as to any material fact, the Court finds this case appropriate for summary judgment. Fed. R. Civ. P. 56(c).

Upon careful consideration of the important issues here presented to it, the Court holds that R.C. 3513.257 imposes a substantial burden on plaintiffs' fundamental rights and and is not justified by any compelling state interest. Accordingly, the Court concludes that the statute is unconstitutional and the defendant must accept plaintiffs' nominating petition and other documents for processing.[1]

Discussion of Law

Defendant Celebrezze concedes that the sole reason for rejecting Anderson's filing was that it was not tendered by March 20. Therefore, the sole statutory provision at issue in this case is the first sentence of R.C. 3513.257[2]

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[1] Having resolved below that the statute is unconstitutional under the First and Fourteenth Amendments, the Court does not reach plaintiffs' claims under the Supremacy Clause of Article VI of the United States Constitution.

[2] This sentence reads:

> Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election, except persons desiring to become independent

which establishes the time deadline for the filing of a declaration of candidacy and nominating petitions necessary to qualify an independent for candidacy.

This filing deadline has emerged virtually unscathed from the rather tumultuous course the Ohio election laws have taken since the Supreme Court subjected them to thorough examination in the landmark case of *Williams* v. *Rhodes*, 393 U.S. 23 (1968). In *Williams* the Court held that the Ohio electoral scheme, taken as a whole, burdened voting and associational rights, working an invidious discrimination in violation of the Equal Protection Clause.[3] The statutory scheme required an unusually high number of signatures (15% of the ballots cast in the last gubernatorial election), a highly structured state political organization, a primary election conforming to detailed and and rigorous standards, and an early filing deadline. It made no provision for independents or for write-in candidates. Finding that the elector scheme effectively excluded minor parties from the electoral process and operated to preserve the position of the two major parties as the only meaningful contenders on the Ohio ballot, the Court upheld a challenge by two minor parties seeking access to the presidential election ballot.

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joint candidates for the offices of governor and lieutenant governor, shall file no later than four p.m. of the seventy-fifth day before the first Tuesday after the first Monday in June [*i.e.*, the date of the primary election, *see* R.C. 3513.01] at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petitions provided in section 3513.261 of the Revised Code.

[3] Mr. Justice Black's opinion for the Court was joined by three other justices. Mr. Justice Douglas joined in the opinion and concurred in the decision emphasizing that the First Amendment and the Due Process Clause of the Fourteenth Amendment provided an additional source of protection for plaintiffs' rights. Mr. Justice Harlan concurred in the result, stating in his view the decision should rest entirely on the basic right of political association assured by the First Amendment and the Due Process Clause of the Fourteenth Amendment. Mr. Justice Stewart, Mr. Justice White and Mr. Chief Justice Warren dissented.

Since that time, Ohio has significantly lowered its signature requirement to 5,000, which in this election year amounts to about twelve one-hundredths of one percent of the vote in the last presidential contest. It now permits write-in votes for candidates filing a declaration of candidacy and a slate of presidential electors 20 days before the election. R.C. 3513.041. It permits independents to run for President and minor parties to qualify without primary elections.

Viewing the present statutory scheme as a whole it is arguable that these changes softened the restrictive impact of the filing deadline. In addition, the deadline itself has since been amended to fall later in the election year. In 1968 the filing date fell on Febraury 7. *Williams* v. *Rhodes*, *supra*, 393 U.S. at 26. Thus the precise issue presented here, namely, whether the present Ohio filing deadline works an unconstitutional deprivation, was not decided by the Supreme Court in *Williams* v. *Rhodes*.

On the other hand, and notwithstanding the changes noted, the deadline remains substantially the same as the deadline forming part of the restrictive statutory scheme enacted between 1948 and 1952 after the Henry Wallace campaign in 1948, *see Socialist Labor Party* v. *Rhodes*, 318 F.Supp. 1262, 1269 and n.11 (S.D. Ohio 1979) (three-judge court); *Williams* v. *Rhodes*, *supra*, 393 U.S. at 47 n.9 (Harlan, J., concurring), and expressly included by the Supreme Court among the laws comprising the restrictive scheme it held unconstitutional in *Williams*, 393 U.S. at 27.

The First Amendment and Fundamental Rights Implicated by R.C. 3513.257

Ballot access jurisprudence has undergone considerable development in the 12 years since the Court decided *Williams* v. *Rhodes*. The appropriate starting point in this analysis is, therefore, the most recent Supreme Court opinion in the area of ballot access laws, *Illinois Board* v. *Socialist Workers Party*, 440 U.S. 173 (1979). While that

case dealt with a different type of restriction—signature requirements— than is at issue here, it summarizes succinctly the fundamental rights implicated by restrictions on ballot access:

> Restrictions on access to the ballot burden two distinct and fundamental rights, "the rights of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." [Citing *Williams* v. *Rhodes*, 393 U.S. 23 (1968)]. The freedom to associate as a political party, a right we have recognized as fundamental, see 393 U.S. at 30-31, has diminished practical value if the party can be kept off the ballot. Access restrictions also implicate the right to vote because, absent recourse to referendums, "voters can assert their preferences only through candidates or parties or both." *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974). By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure. *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964); *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964); *Dunn* v. *Blumstein*, [405 U.S. 330, 336 (1972)].

Id. at 184.

R.C. 3513.257 does abridge fundamental rights of the plaintiffs. The deadline prevents plaintiff Anderson from appearing as a candidate on the Ohio ballot in the November election. It likewise prevents plaintiff George H. Hetrick from qualifying as a candidate for presidential elector pledged to support Anderson in that election. In so doing, the law clearly burdens these plaintiffs' rights of expression and association secured by the First Amendment. It implicates an individual's "important interest

in the continued availability of political opportunity," *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974), and his right "to associate for the advancement of political beliefs." *Williams* v. *Rhodes*, *supra*, 393 U.S. at 30. Denying these plaintiffs access to the ballot may not directly penalize the exercise of their right to associate, but it does diminish the effectiveness of their exercise of the right.

While Anderson may still participate in the election by virtue of Ohio's write-in procedure, it requires little discussion to recognize that a write-in candidacy is an inadequate alternative to ballot placement. As the Supreme Court observed in *Lubin* v. *Panish*, *supra*, 415 U.S. at 719, n.5 "[t]he realities of the electoral process . . . strongly suggest that 'access' via write-in votes falls far short of access in terms of having the name of the candidate on the ballot."

The First Amendment associational rights implicated by the deadline are inextricably bound up with a candidate's First Amendment rights of expression, which are also abridged by the filing deadline. As the Supreme Court recognized in *Illinois Board*, *supra*, 440 U.S. at 186, "an election campaign is a means of disseminating ideas as well as attaining political office. . . . Overbroad restrictions on ballot access jeopardize this form of political expression." In some ways, ballot placement may signal the political viability of a campaign and trigger funding, media coverage, and credibility in the minds of voters. All serve to open channels for the dissemination of the candidate's political message.

In a similar fashion the individual's right to a place on the ballot overlaps with and is intertwined with fundamental rights of the voters. *Williams* v. *Rhodes*, *supra*, 393 U.S. at 30; *Lubin* v. *Panish*, *supra*, 415 U.S. at 716. By preventing Anderson from appearing on the ballot, the filing deadline denies plaintiff Leslie Laufman, M.D., and other registered voters in Ohio like her who wish to cast their vote in the 1980 general election for the slate of

electors pledged to Anderson, the constitutional right to associate for the advancement of political beliefs, *Kusper* v. *Pontikes*, 414 U.S. 51, 56-57 (1974) and the fundamental right "to cast their votes effectively" for the candidates of their choice. *Williams* v. *Rhodes*, *supra*, 393 U.S. at 23. As with the expression and associational rights of the candidates themselves, the right to vote "has diminished practical value if the party [or candidate] can be kept off the ballot." *Illinois Board*, *supra*, 440 U.S. at 184.

Furthermore, in the case of a national presidential race, the state deadline affects the rights of voters supporting Anderson not only in Ohio, but also in other states where his name will appear on the ballot. Plaintiff Gerald M. Eisenstat is a registered voter in the State of New Jersey where Anderson's name has been certified to appear on the ballot in the 1980 general election. Eisenstat intends to cast his vote for the slate of electors pledged to Anderson in New Jersey. As of June 9, 1980, supporters of Anderson have gathered sufficient signatures (if determined valid) in each of ten states to place his name on the ballot as an independent candidate for President. Active petition drives are underway in nine additional states. Anderson's political campaign organization, the National Unity Campaign, has established an extensive network of offices nationwide. The Campaign intends to obtain and file the requisite number of signatures to qualify for the ballot in all the remaining states as quickly as possible. In addition to Ohio, it appears that Anderson has not met the filing deadlines of four states. The Anderson Campaign has instituted or intends to institute actions, if necessary, challenging those deadlines in order to obtain access to the ballots in those states as well.[4]

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[4] The Ohio deadline falls earlier in the election year than all but two other states: Maryland and New Mexico. The plaintiffs have already obtained a preliminary injunction placing Anderson on the ballot in New Mexico. *Anderson* v. *Hooper*, Case No. 80-432-M (D. N.M. July 8, 1980).

The goal of voters such as plaintiff Eisenstat in states where Anderson will appear on the ballot is to amass enough electoral votes to elect Anderson. Ohio's deadline, by denying Anderson a place on the ballot, removes the sixth largest slate of electors from Anderson's reach and thereby reduces the total pool of electoral votes for which he may compete nationwide by 25 electors. This arguably dilutes the vote of Eisenstat and others similarly situated. Although in a somewhat different context, the Supreme Court has noted that "[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen." *Reynolds* v. *Sims*, 377 U.S. 533, 567 (1964).

The rights implicated by the Ohio filing deadline "rank among our most precious freedoms." *Williams* v. *Rhodes*, *supra*, 393 U.S. at 23. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry* v. *Sanders*, 376 U.S. 1, 17 (1964). The right to vote secures all other First Amendment rights by enabling the people to choose those who would make and enforce the laws; at the same time, it seems to me, voting is itself an exercise of First Amendment rights because it affords a voice for the expression of political preferences and a vehicle for associating for the propagation of political beliefs.

In assessing the extent of the burden on the exercise of these rights, the amount of support for a barred candidate is relevant. *See, e.g.*, *Williams* v. *Rhodes*, *supra*, 393 U.S. at 34. Anderson's losses in each of the Republican primaries he entered prior to April 24 indicate quite clearly he did not enjoy support from a majority of the Republican Party. On the other hand, the parties submitted five exhibits summarizing the results of opinion polls conducted by national polling organizations since the announcement of Anderson's independent candidacy reflecting that he has support from between 23% (nationally) and 44% (New York) of the electorate. He collected contributions from over 40,000 individuals during the five weeks between April 24, 1980 and June 3,

1980. Support for Anderson's independent candidacy appears to be substantial, and the number of persons in Ohio and elsewhere whose fundamental rights are implicated by the Ohio deadline is similarly substantial.

The Standard of Review under the First and Fourteenth Amendments

When rights as fundamental as these are substantially abridged by legislative enactment, the First and Fourteenth Amendments command that the law may be justified only if it is necessary to achieve a compelling state interest. I believe this is the import of the Supreme Court's decision in *Kusper* v. *Pontikes*, 414 U.S. 51 (1974). In *Kusper* the Court, in striking down a voter disaffiliation law, made no mention of the Equal Protection Clause, but grounded its decision directly on First Amendment protection of political association and the Due Process Clause of the Fourteenth Amendment:

> There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and Fourteenth Amendments. *NAACP* v. *Button*, 371 U.S. 415, 430; *Bates* v. *Little Rock*, 361 U.S. 516, 522-523; *NAACP* v. *Alabama*, 357 U.S. 449, 460-461. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom. *Williams* v. *Rhodes*, 393 U.S. 23, 30. Cf. *United States* v. *Robel*, 389 U.S. 258.
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> To be sure, administration of the electoral process is a matter that the Constitution largely entrusts to the States. But, in exercising their powers of supervision over elections and in setting qualifications for voters, the States may not infringe upon basic constitutional protections. See, *e.g.*, *Dunn* v. *Blumstein*, 405 U.S. 330; *Kramer* v. *Union School District*, 395 U.S. 621; *Carrington* v. *Rash*, 380 U.S. 89. As

> the Court made clear in *Williams* v. *Rhodes*, *supra*, unduly restrictive state election laws may so impinge upon freedom of association as to run afoul of the First and Fourteenth Amendments. 393 U.S., at 30. And see *id.*, at 35-41 (Douglas, J., concurring); *id.*, at 41-48 (Harlan, J., concurring).
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> * * * *
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> As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. *Botes* v. *Little Rock*, *supra*, at 524; *NAACP* v. *Alabama*, *supra*, at 463.

Id. at 56-58. And the Court in *Kusper* made it clear that a law infringing these rights be the least restrictive means to achieve the State's interest:

> For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. . . . If the State has open to it a less drastic way of satifying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties. *Shelton* v. *Tucker*, 364 U.S. 479, 488.

Id. at 58-59. And see *American Party of Texas* v. *White*, 415 U.S. 767, 780 (1974) in which it was stated, "whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discrimination against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests." (Citing *Storer* v. *Brown*, *supra*, at 729, 33; footnote omitted). *See also Williams* v. *Rhodes*, *supra*, 393 U.S. at 35-41 (Douglas, J., concurring); *id.*, 44-48 (Harlan, J., concurring).

It may be that after *Kusper* v. *Pontikes* it is enough to find that a law such as this abridges constitutionally protectible rights under the First Amendment to trigger

the State's duty to establish a compelling state interest justifying that abridgment. Nevertheless, the plaintiffs assert their claims additionally under the Equal Protection Clause of the Fourteenth Amendment. The Court will now address that argument.

Equal Protection

Plaintiffs' equal protection argument, simply put, is that the deadline unfairly discriminates against independent candidates with respect to the time when they, as compared with candidates of both major and minor parties, are required to qualify as candidates for the general election.

Under Ohio law, the names of the candidates of the two major parties are placed on the general election ballot by the Secretary of State after they are nominated by their respective national party conventions. R.C. 3505.10, 3513.11. In 1980, in the case of the Democratic candidate, this will not occur until approximately August 18. Minor party candidates need not certify their nominees to the Secretary of State until 75 days before the general election, that is, on or about August 20. R.C. 3505.10. This year the defendant will prepare the ballot after the completion of the national party nominating conventions in mid to late August.

The thrust of plaintiffs' argument appears to be that the early filing deadline compels independent candidates to declare their candidacy 75 days prior to the *primary* election, four to five months earlier than partisan candidates. By doing so, the deadline effectively locks independents into place on March 20, 1980, leaving the parties until late August to develop the issues and to choose a nominee they hope will best respond to those issues.

Viewed in another way, the deadline operates to bar any independent candidacies not declared by March 20 although party candidates may run in the general election without having filed on that date.

A

The Secretary of State argues that similar treatment is afforded the different types of candidates, and that no discrimination occurs because party candidates are also required to meet the March 20 deadline by causing their delegates to file at that time in order that they may participate in the primary. The delegates, according to the Secretary of State, are in actuality surrogates for the candidate himself. Defendant argues that because the delegates are bound by local party rules to cast their first ballot at national nominating conventions for the candidate chosen by Ohio voters in the primary, and because the role of party primaries in the nominating process has become more important in recent years, it is unlikely that a party candidate can sit on the sidelines during the primaries, as for example General Eisenhower did in 1952, and become the nominee of a major party.

Therefore, according to the defendant's reasoning, both partisan and independent candidates for the most part are held to the same March 20 deadline, and there is no disparate treatment of them.

The Court cannot accept defendant's argument. The Ohio statutes require the independent to commit himself early in the election year to his independent candidacy and grant the parties, both major and minor, until late August to choose their candidates. Regardless of the likelihood of such an occurrence, the statutes do permit a partisan candidate to receive the nomination of his party and thereby appear on the Ohio general election ballot in November, without previously having had to file with the Secretary of State. To these partisan candidates, emerging from the political conventions in mid-summer, R.C. 3513.257 has no application. If a party candidate does not file on March 20, he is by no means barred from running as his party's choice in the coming general election. An independent's failure to file at that early date does in fact work such a forfeiture.

In addition, defendant's argument tends to ignore material differences between running as a candidate in the general election and running as a candidate in a party primary. In order to win the primary, partisan primary candidates aim to attract the support of other partisans. At a general election, candidates appeal to the entire national constituency. Before the party primaries, surely the general election campaign issues and the positions of the candidates have not yet crystallized. The platform positions upon which party candidates run in the general election are hammered out at the convention, long after the primary. When the party candidate files his declaration of candidacy on March 20, he is making the statement that he intends to vie in the primary for the votes of members of his party: whether he will run in the general election as his party's choice is by no means assured. On the other hand, when the independent files his declaration of candidacy and his nominating petitions on March 20, he is making the statement that he intends to run, not in the primary, for he is not in that race, but in the general election in November.

In some respects, running in the party primary is an exercise—an experiment aimed at determining whether the candidate can raise enough support and enthusiasm among party members to allow for a continued quest for the presidency. By March 20, before the primary winners are known or party platforms established and far ahead of the final selection of the party candidates, the independent must evaluate the support and enthusiasm for his candidacy and determine whether he should run in the general election seven months later.

For these reasons, the Court concludes that the Ohio statutory scheme does in fact treat partisans and independents differently. The question then becomes whether these differences in treatment are justified by functional dissimilarities between the two types of candidates.

B

The Supreme Court has noted that "[t]he fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support on the one hand, and a new or small political organization on the other. [A State is not] guilty of invidious discrimination in recognizing these differences and in providing different routes to the printed ballot." *American Party of Texas* v. *White*, 415 U.S. 767, 782 n.13 (1974), quoting from *Jenness* v. *Fortson*, 403 U.S. 341, 441-42 (1971). The Supreme Court has recognized that it could be a violation of equal protection were the State to treat identically what in the political arena are two fundamentally different forms of candidacy. *Jenness* v. *Fortson*, *supra*, 403 U.S. at 442.

Applying this reasoning, it can be argued that there may be no invidious discrimination between entities which are by nature to be handled differently. One cannot compare for all purposes the independent candidate with the candidate who conducts his campaign within the party system; nor can one compare him with a party. It seems equally clear, however, that statutory line-drawing that operates to abridge fundamental rights of some persons must be explicable in terms of differences between the persons on either side of the line.

In the Court's view, the partisan candidate for the national office of President is similar enough in critical ways to the independent candidate for that office, that to treat the two dissimilarly, *i.e.*, by subjecting the independent to R.C. 3513.257 and not the partisan, arguably states a claim under the Equal Protection Clause.

Thus notwithstanding the extreme importance of the partisan candidate's affiliation with the support superstructure and machinery of a political party, a critical element of his success or failure at the general election is the personal constituency which must rally to his cause.

This vital support depends significantly on the candidates' appeal as an individual.

Likewise an independent candidate looks to develop a constituency that is attracted to him as an individual as well as to his stance on the issues. It is not, then, unrealistic to find that a voter seeking a presidential candidate to support often look not so much at labels, but at *persons*. Because the personal and issue appeal of a partisan candidate vies in many respects equally on the political field with the independent's personal and issue appeal, the disparate treatment accorded these candidates in Ohio may well be suspect under the Equal Protection Clause.

At minimum there is sufficient similarity in the candidacies of the two to require that any law treating them differently be narrowly drawn to afford the greatest protection to the fundamental rights involved.

The Standard of Review under the Equal Protection Clause of the Fourteenth Amendment

In *Illinois Board* v. *Socialist Workers Party*, 440 U.S. 173 (1979), the Court applied a standard equal protection analysis, balancing the interests of the State in maintaining a classification against the burdens on fundamental rights imposed by the classification, and holding that the classification was unnecessary to achieve any compelling interest:

> When such individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest. *American Party of Texas* v. *White*, 415 U.S. 767, 780-81 (1974); *Storer* v. *Brown*, 724, 736 (1974); *Williams* v. *Rhodes*, *supra*, at 31.
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> * * * *
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> The signature requirements . . . are plainly not the least restrictive means of protecting the State's ob-

> jectives . . . appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago.

Id. at 184-86.

The Secretary of State argues vigorously that the compelling interest standard stated in *Illinois Board* is not applicable to this case because the Supreme Court in *Illinois Board* dealt with a statute which, on its face, evidenced a blatant discrimination. The defendant urges further that the Court should employ a test set forth in *Storer* v. *Brown*, 415 U.S. 724 (1974) and *Mandel* v. *Bradley*, 432 U.S. 173 (1977) to require a preliminary showing by plaintiffs that Anderson is a "reasonably diligent candidate" before bringing a compelling state interest analysis into play.

The Court rejects both of these arguments for the following reasons. First, it is clear from the language of the Court's opinion in *Illinois Board* and from the facts of that case that it was analyzing the constitutionality of the statute as applied rather than on its face.[5]

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[5] The statute at issue in *Illinois Board* provided different signature requirements for different political offices. Thus, new political parties and independents were required to obtain the signatures of 25,000 qualified voters to appear on the ballot in statewide elections. 440 U.S. at 175. In order to appear on the ballot for offices of political subdivisions of the state, the signatures of 5% of the number of persons voting in the last election for offices within the particular subdivision were required. That this distinction does not facially demonstrate blatant discrimination is plain given that in most subdivisions of a state, 5% of the voters in a particular subdivision election would represent far fewer than 25,000 signatures. The Court recognized "[t]hat the distinction between state and city elections undoubtedly is valid for some purposes" but that this fact did "not resolve whether it is valid *as applied here*." *Id.* at 184.

The Court found that the distinction, *"as applied in the City of Chicago," id.* at 183, produced the incongruous result that a new party or an independent candidate for mayor of Chicago need obtain substantially more than the 25,000 signatures required for a state-

Second, the Supreme Court in *Storer* and *Mandel* did not eschew the application of a compelling interest standard of review. A careful reading of the *Storer* opinion indicates the Court applied that standard, finding that a compelling state interest justified barring one set of plaintiffs from the ballot, and that its application was frustrated by an inadequate record as to the others.

The defendant's contention that the *Storer* Court propounded a new test establishing a threshold which must be crossed by the challenger before the State need assert any compelling interest is predicated on the following passage from that opinion:

> Third, once the number of signatures required in the 24-day period is ascertained, along with the total pool from which they may be drawn, there will arise the inevitable question for judgment: in the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?

Storer v. *Brown*, 415 U.S. 724, 742 (1974). *See also* *Mandel* v. *Bradley*, 432 U.S. 173, 177-78 (1977).

Placing the passage in its proper context, the Court simply cannot accept the defendant's novel theory that this passage propounds a new standard of review in ballot cases.[6] The passage relates to a claim that the statu-

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wide office. Because Chicago is such a populous subdivision, 5% of the voters at previous Chicago elections exceeded 25,000. Finding no compelling interest advanced to justify the apparent anomaly, the Court did not strike down the statute as invalid on its face but limited its holding to the City of Chicago. *Id.* at 187.

[6] In *Storer*, four independents sought access to the ballot, two for the United States Congress and two for the national offices of President and Vice President. All four challenged provisions of the California Elections Code forbidding ballot position to an independent if he voted in the preceding primary, had a registered affiliation with a qualified political party within one year prior to the last

tory requirement that independent candidates obtain a given percentage of signatures within a 24-day period unfairly excluded independents from the ballot.

The test stated by the Supreme Court in *Storer* is a guide for determining the facts relevant to the legal

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primary, or obtained signatures of less than 5% of the vote cast in the last general election. All signatures were required to be obtained in a 24-day period and none could be those of voters at the primary. *Storer* v. *Brown*, 415 U.S. 724, 726-27 (1974).

In Part I of the opinion, the Court found that both men seeking congressional office were disqualified by their affiliation with a political party within the preceding year. Applying the test set forth in *Williams* v. *Rhodes*, the Court concluded the disaffiliation requirement served a compelling state interest. *Storer* v. *Brown*, *supra*, 415 U.S. at 736. *See infra*. Finding these candidates validly barred, the Court found no need to examine the other challenged provisions as applied to them.

In Part II, the Court addressed the challenges of the presidential hopefuls to the signature provisions requiring at least 5% of the prior vote cast to be gathered in 24 days from persons who had not voted in the primary. Attempting to apply an equal protection balancing analysis, the Court found itself unable to ascertain the precise impact of the laws, a finding crucial to the determination of whether they were necessary means to a legitimate end. In order to determine the extent of the burden imposed by the 5% requirement, it was necessary to know how many votes were cast in the preceding election. In order to know whether that number could reasonably be obtained from persons not voting in the primary, it was necessary to know how many persons voted in the primary. Only then could the Court "assess realistically" the impact of the law on prospective candidates. *Storer* v. *Brown*, *supra*, 415 U.S. at 738.

Accordingly, the Court remanded the case for further factfinding. Before doing so, however, the Court resolved three issues to clarify the guidelines for further proceedings in the district court. The first concerned the validity of disqualifying persons voting in the primary from signing an independent's petition. The second voiced the Court's concern that the disqualification of such persons who voted in a nonpartisan primary may not have been supported by a compelling state interest. The third is the passage quoted above, stating the test to be applied once the facts were found regarding the number of signatures required.

questions raised by the petitioners in *Storer*. Obviously, one cannot balance considerations whose relative weight is unknown. It was necessary for the trial court to apply the test stated by the Supreme Court in *Storer* to arrive at the facts necessary to apply the standard established by other cases.

Third, the *Storer* test is inapplicable to the facts of the case at bar. Anderson does not claim that the filing deadline or any other Ohio law places an onerous burden on him to gather sufficient signatures to show substantial community support.[7] The facts submitted by the parties

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[7] The defendant urges that the Supreme Court's decision in *Mandel* v. *Bradley*, 432 U.S. 173 (1977) is factually analogous to the case before the Court because it concerned an early filing date with no time limit for gathering signatures. In *Bradley*, the Supreme Court criticized the lower court for construing its summary affirmance in another case, *Tucker* v. *Salera*, 424 U.S. 959 (1976), *aff'g* 399 F.Supp. 1258 (E.D. Pa. 1975), as controlling precedent for the broad proposition that early filing dates were unconstitutionally burdensome on an independent's access to the ballot. *Bradley*, *supra*, 432 U.S. at 175. The Court distinguished *Salera* from *Bradley* on the grounds that in addition to the early filing date in *Salera* there was also a limited time period for gathering signatures, which increased the difficulty of meeting the signature requirement. *Id.* at 177. As it had done in *Storer*, the Supreme Court remanded the *Bradley* case for further factual inquiry, instructing the district court to undertake the *Storer* inquiry into the ability of a reasonably diligent candidate to satisfy the ballot access requirements. Reading *Bradley* liberally, one may argue that it commands application of a *Storer* "reasonable diligence" factual inquiry to a challenge to a early filing deadline standing alone and uncomplicated by signature-gathering requirements.

However, the *Bradley* case is distinguishable. Like *Storer*, the issues concerned the State's legitimate interest in requiring some showing of community support and the extent of burdens imposed on a candidate trying to demonstrate that support.

Mr. Bradley himself started quite early and attempted over a period of months to acquire the necessary signatures by the March deadline. Bradley submitted a few thousand more than the 51,755 signatures required, but over 10,000 were thereafter invalidated

show that Anderson supporters gathered more than three times the number of required signatures in Ohio within a five-day period. There can be no question that Anderson was "reasonably diligent" in satisfying Ohio's minimal signature requirements once he decided to run as an independent.

The "reasonable diligence" of the candidate is simply not a relevant consideration when the issue posed by the challenged law is a filing deadline, for that deadline, in this case at least, measures only the time that a candidate must reach a decision about whether to run. *See Mandel* v. *Bradley*, 432 U.S. 173, 181-82 (1974) (Stevens, J., dissenting). Thus, as plaintiffs noted in oral argument, a "reasonably diligent candidate" could meet the deadline within the meaning of *Storer*, and the deadline could still be constitutionally unsound. For example, if Ohio were to set the filing date in November of the year preceding the general election and require only 100 signatures to qualify for ballot placement, most candidates who had by November decided to run for office would presumably be able to acquire enough signatures, and defendant's *Storer-Bradley* "threshold" test would apparently be satisfied. That fact, however, would not preclude the Court from inquiring whether the State has a compelling state interest in requiring a potential candidate to commit himself so far in advance of the general election.

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and he was disqualified. Bradley filed suit challenging both the deadline and the signature requirement on the ground that the "early filing deadline made it more difficult for Bradley to obtain the requisite number of signatures than for a party member to win a primary . . . ." *Mandel* v. *Bradley*, *supra*, 432 U.S. at 174. He placed in issue the effect of the deadline in combination with the signature requirement to deprive him of the opportunity to demonstrate his community support. In erroneously assuming that the Supreme Court's affirmance in *Salera* mandated a holding that the filing date by itself was *per se* unconstitutional, the District Court failed to undertake an independent analysis of the interaction of the deadline with the signature requirement. *Id.* at 178.

What is at issue in this case is the State's power to demand that an independent candidate reach a decision about whether to run months before a primary in which he does not take part, and the State's power to require this of him when it is not required of all partisan candidates. I cannot accept the defendant's contention that the State may measure in terms of *Storer-Bradley* "diligence" the time a candidate makes up his mind to run for office.

Finally, the *Illinois Board* analysis states no new principles. It merely applies principles enunciated in earlier cases. In a case concerning the unconstitutionality of poll taxes, the Supreme Court stated "that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined." *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

This standard of review was translated into the language of *Illinois Board* through a series of decisions concerning voting and associational rights including *Kramer* v. *Union School District*, 395 U.S. 621 (1969) (state apportionment statutes); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972) (durational residence laws). *Williams* v. *Rhodes*, *supra*, confronted with the unusually heavy burdens discussed above, applied the same test:

> In determining whether the State has power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that "only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms." *NAACP* v. *Button*, 371 U.S. 438 (1964).

Accordingly, the standard of review under the Equal Protection Clause of R.C. 3513.257 must be whether it is necessary to further a compelling state interest.

Compelling State Interests

Having found above that the filing deadline substantially abridges First Amendment and fundamental rights of the plaintiffs and discriminates between persons in many respects similarly situated, the Court must determine whether it does so in furtherance of compelling state interests.

First, it is important to note what state interests are *not* in issue in this case. The defendant does not contend that the filing date of March 20 is necessary to permit the State a certain period of time to perform the administrative tasks necessary to place a candidate's name on the ballot, such as verifying signatures, resolving challenges, and printing ballots. Certainly the State has a legitimate interest in requiring candidates to file their papers in time to perform these administrative matters. *See, e.g., Salera* v. *Tucker*, 399 F.Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976). But the Secretary of State has conceded that the nominating petitions filed on March 20 remain unprocessed in his office until June 15, when he transmits them to county boards of election. The boards do not begin actually verifying the signatures until the period July 1 to July 15. Finally, the Secretary of State does not certify the names of presidential candidates (including independents) for inclusion on the ballot until after the party nominating conventions, sometime in late August. Based upon the stipulated facts, it appears that no more than 75 days are necessary to perform these tasks. The State's interest, from an administrative standpoint, in an orderly processing of names for inclusion on the ballot has not been and cannot be asserted to justify a deadline 229 days prior to the general election.

The Court will now turn to an analysis of the state interests which defendant claims are promoted by the legislation in issue. Chief among the interests asserted is the preservation of the State's political stability. Defendant relies heavily on Part I of *Storer* v. *Brown*, *supra*, as

support for this proposition. As noted above, in Part I of *Storer* the Supreme Court dealt with a challenge to several provisions of the California Elections Code brought by two independent candidates for Congress. These candidates challenged the Code's "disaffiliation" provisions which prohibit a candidate from running as an independent if he either voted in the immediately preceding primary election or had a registered affiliation with a qualified political party within one year prior to the immediately preceding primary. The Supreme Court had "no hesitation" in sustaining this provision, finding that it advanced a "general state policy aimed at maintaining the integrity of the various routes to the ballot." 415 U.S. at 733.

In reaching its decision in *Storer* the Court detailed the nature of the California direct party primary system, the goals of which the Court found were supported by the disaffiliation requirements:

> Section 6830(d) . . . protects the direct primary process by refusing to recognize independent candidates who do not make early plans to leave a party and take the alternative course to the ballot. It works against independent candidacies prompted by short-range political goals, pique, or personal quarrel. It is also a substantial barrier to a party fielding an "independent" candidate to capture and bleed off votes in the general election that might well go to another party.
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> It appears obvious to us that the one-year disaffiliation provision furthers the State's interest in the stability of its political system. We also consider that interest as not only permissible, but compelling and as outweighing the interest the candidate and his supporters may have in making a late rather than an early decision to seek independent ballot status. Nor do we have reason for concluding that the device

> California chose, § 6830(d) (Supp. 1974), was not an essential part of its overall mechanism to achieve its acceptable goals. As we indicated in *Rosario*, the Constitution does not require the State to choose ineffectual means to achieve its aims. To conclude otherwise might sacrifice the political stability of the system of the State, with profound consequences for the entire citizenry, merely in the interest of particular candidates and their supporters having instantaneous access to the ballot.

415 U.S. at 436-47 (footnote omitted).

From the above there can be no doubt that a state has, as the defendant claims, a legitimate and compelling interest in maintaining the stability of its political processes. The defendant argues therefore that R.C. 3513.257 fosters this interest in Ohio by in effect acting as a disaffiliation statute as to Congressman Anderson. In other words, the defendant claims that Anderson would have been able to meet the March 20 deadline if only he had decided at some point earlier than March 20 to disaffiliate, and cease his activities in the Republican state primaries.

Although the defendant's argument has some surface appeal, several points are clear. First, the statute gives absolutely no indication on its face that it was intended to be a disaffiliation provision. Indeed it is difficult to identify any basis for so finding. R.C. 3513.257 would not bar the staunchest party member who decided on March 19 to change horses and file as an independent, for example, nor would it permit a true independent to run, if he or she filed on March 21. Likewise, Anderson apparently could run in the other 49 states as a Republican, and R.C. 3513.257 would not bar him from running as an independent in Ohio so long as he filed here as such by March 20. Thus, unlike the California provisions upheld in *Storer*, which were plainly drafted to effect a comprehensive and nondiscriminatory disaffiliation scheme, *see*, 415 U.S. at 733, it is clear that R.C.

3513.257 acts as a disaffiliation provision only by mere happenstance, not by any reasonably discernible legislative design.

Second, even if the Court were to assume that the Act is a disaffiliation provision, the defendant has not been persuasive that the compelling state interest which the Supreme Court found in the context of a statewide election in Part I of *Storer* is equally compelling in an election for the national office of President. Indeed, it is undisputed that California does not even apply its disaffiliation laws to a presidential candidate. Nor has the Court's attention been drawn to any case in which a State's disaffiliation statute has been applied to such a candidate. Thus when the defendant argues that the burden placed on Congressman Anderson by R.C. 3513.257 is minimal compared to the one-year disaffiliation requirement exacted by California, he strains to force a national peg into a state hole.

Finally, Ohio does have a disaffiliation statute of sorts in R.C. 3513.04,[8] the so-called "sore loser" provision, which prohibits a candidate from seeking a place on the general election ballot by means of nominating petition or by write-in when he had filed a declaration of candidacy for a party nomination in the preceding primary. Because Anderson withdrew from the Ohio primary in time to have his name removed from the ballot, the State concedes that R.C. 3513.04 does not apply to him. Nevertheless, the defendant argues that R.C. 3513.04, when combined with R.C. 3513.257 here at issue comprises a "comprehensive yet reasonable regulation" which serves to further the state interests recognized as valid in *Storer*. This attempt to bootstrap R.C. 3513.257 into a compelling interest is not convincing. Again, the mere coincidence of

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[8] The defendant argues that R.C. 3513.04 is directed at barring party-affiliated candidates who lost in the primary from running as independents in the general election. While that is true, the statute also bars them from running as partisans. *See, State ex rel. Gottlieb* v. *Sulligan*, 175 Ohio St. 238 (1963).

the facts that a filing deadline bars a candidate from getting on the ballot as an independent and that the candidate was formerly a partisan, hardly transforms the deadline statute into a disaffiliation act. Further, the Court is not persuaded that R.C. 3513.257 and 3513.04 "dovetail" into a reasonable and coordinated State scheme for promoting political stability simply because both statutes may operate to bar former partisans from running as independent candidates.

In short, the defendant has demonstrated no interest served by the filing deadline other than its simple function as an arbitrary point in time by which independent candidates must officially throw their hats into the political ring.[9] Nor can the Court discern any aspect of the nature

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[9] The defendants contend that this case is controlled by the Supreme Court's summary affirmance of the decision of *Sweetenham* v. *Rhodes*, decided together with *Socialist Labor Party* v. *Rhodes*, 318 F.Supp. 1262 (S.D. Ohio 1970) (three-judge court), *aff'd sub nom. Sweetenham* v. *Gilligan*, 409 U.S. 942 (1972). The Court rejects the defendant's position.

The Supreme Court has repeatedly cautioned against attaching broad precedential significance to summary affirmances. Lower courts are bound by summary actions on the merits by the Supreme Court, *Hicks* v. *Miranda*, 422 U.S. 332 (1975), but because a summary affirmance affirms the judgment only and not the reasoning of the lower court, *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977), its precedential value is limited to the precise questions presented and necessarily decided by it. *Id.*

A review of the opinion of the three-judge court in *Sweetenham* reveals quite clearly that the constitutional issue here presented was not necessarily decided in the summary affirmance of that judgment. The entire analysis relative to the filing deadline appears at page 1273:

> Plaintiffs allege that those parts of Sections 3513.257 and 3513.258, Ohio Revised Code, which require nominating petitions to be filed "not later than 4:00 P.M. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding [the] general election" are unconstitutional.
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> The state has an interest in having persons who otherwise qualify for ballot position officially become candidates at a

of independent versus partisan candidacies to justify compelling independents, and not all partisans, to commit themselves to their candidacy on March 20. Indeed, the functional dissimiliarities would appear to counsel against requiring this of independents who do not participate in

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designated time prior to an election. In addition, the state may reasonably require that all persons seeking elective office become officially declared candidates on or before a certain date preceding an election. One may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process.

The plaintiffs Sweetenham and Stapleton herein had not taken steps to become candidates prior to the May 1970 primary election. Plaintiff Sweetenham had obtained 1,600 signatures on her nominating petition by June 29, 1970. Plaintiff Stapleton had obtained 2,455 signatures on his nominating petition by June 29, 1970. Neither plaintiff has filed or tendered a nominating petition with the designated state or county official. Candidates for parties which participated in the primary election were chosen in the May 1970 primary election. The Socialist Labor Party candidates whom this Court has held are entitled to ballot position were chosen on April 26, 1970.

The Court holds that plaintiffs Sweetenham and Stapleton, who did not officially declare their candidacy at or before the time Ohio requires political parties to choose their nominees, are not entitled to ballot position.

The judgment in *Sweetenham* rests on the failure of the challenging plaintiffs to allege a real and immediate injury presenting a case or controversy within Article III of the United States Constitution that would be capable of adjudication by the district court. Having failed even to tender a nominating petition, neither Sweetenham nor Stapleton were in a position to place in issue a deadline regulating the time for filing those petitions.

The Court, in fact, never reached the constitutional issue and certainly did not decide it. Its discussion of the State's interest in having candidates declare their candidacies by a specific date before an election reflects the Court's concern that the plaintiffs in that case had not taken any steps to qualify themselves as candidates at or before the party candidates were chosen.

For these reasons the Court believes its *Sweetenham* decision is of no precedential effect on the central issues decided herein.

the primary contest. Defendant has advanced no compelling interest to support the difference in treatment accorded by the Ohio law.

Defendant argues that the State certainly must set some deadline for filing by independent candidates, and that under Article II, § 1 of the United States Constitution,[10] the State legislature is given broad discretion to direct how and when this may be done. Ohio made a similar argument to the Supreme Court in 1968. The answer of the Court there, in *Williams* v. *Rhodes*, *supra*, is equally applicable here:

> There, of course, can be no question but that [Art. II, § 1] does grant extensive power to the States to pass laws regulating the selection of electors. But the Constitution is filled with provisions that grant Congress or the State specific power to legislate in certain areas. These granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. . . . . Obviously we must reject the notion that Art. II, § 1, gives the States power to impose burdens on the right to vote, where such burdens are expressly prohibited in other constitutional provisions. We therefore hold that no State can pass a law regulating elections that violates the Fourteenth Amendment's command that "No State shall . . . deny to any person . . . the equal protection of the laws."

393 U.S. at 29. Nor can it be doubted that the State legislature's discretion in fixing a filing deadline must be bounded by the First Amendment rights of candidates and voters. Where a deadline acts to impede these rights the Court must perforce analyze the State's interest in imposing such a limitation on important constitutional rights.

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[10] The relevant clause provides in pertinent part, "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . ." to choose a President and Vice President.

In *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973) the Court upheld the constitutionality of a New York statute which requires a voter to enroll in the party of his choice at least 30 days before the general election in order to vote in the next party primary. The effect of that statute is to require party registration some eight months before a presidential primary and eleven months before a non-presidential one. The petitioners claimed that the statute unduly burdened their First and Fourteenth Amendment rights to exercise the franchise and to associate with the political party of their choice. The Court framed the issue as follows:

> The only remaining question, then, is whether the time limitation imposed by § 186 is so severe as itself to constitute an unconstitutionally onerous burden on the petitioners' exercise of the franchise or on their freedom of political association. As the dissent acknowledges, the State is certainly justified in imposing some reasonable cutoff point for registration or party enrollment, which citizens must meet in order to participate in the next election. . . . Hence, our inquiry must be whether the particular deadline before us here is so justified.
>
> * * * *
>
> It is true that the period between the enrollment deadline and the next primary election is lengthy. But that period is not an arbitrary time limit unconnected to any important state goal.

410 U.S. at 760. The *Rosario* Court found that the burden imposed by the New York statute was justified because it served the important state goal of "preserving the integrity of the electoral process," 410 U.S. at 761, by inhibiting party "raiding." The four-justice dissent argued that the asserted stated interest was "hardly substantial enough" to justify the impediment raised by the statute. 410 U.S. at 769.

In the Court's view the present case is readily distinguishable from *Rosario* simply because the filing deadline imposed upon independent presidential candidates by R.C. 3513.257 serves no compensating state interest such as that found in *Rosario*. As already noted, the only justification seriously raised by the defendant is that of political stability, a justification which the Court has found to be tenuous at best. Even if the statute in fact served such a legitimate purpose, it would have to do so in a manner which avoids unnecessary restrictions on constitutional freedoms since "[s]tatutes affecting constitutional rights must be drawn with 'precision,'. . . and must be 'tailored' to serve their legitimate objectives." *Dunn* v. *Blumstein*, 405 U.S. 330, 343 (1972). The Court will now turn to this inquiry.

In 1976 this Court heard a challenge to another provision of Ohio's election laws, R.C. 3513.191, which prohibited a person from running as a party candidate in a primary election if he had voted as a member of a different political party within the preceding four years. *Kay* v. *Brown*, 474 F. Supp. 588 (S.D. Ohio 1976) (three-judge court). There the State claimed that the statute implemented a number of compelling interests, including the preclusion of political candidacies prompted by short-range goals, ensuring party loyalty, and ensuring that candidates did not affiliate with political parties for "opportunistic reasons." *Id.* at 593. Recognizing that these goals were legitimate ones, this Court nevertheless found that the statute by which the State purported to advance these goals was impermissibly broad, as applied to the particular plaintiff in the case, since it in effect locked him into a political party which in fact had become defunct. The Court there reminded this defendant's predecessor of the Supreme Court's admonition that "[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id.*, quoting from *NAACP* v. *Button*, 371 U.S. 415, 438, and that

> [i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a legislative scheme that broadly stifles the exercise of fundamental personal liberties.

Id., quoting from *Kusper* v. *Pontikes*, *supra*, 414 U.S. at 59.

The Supreme Court reiterated this important theme most recently in *Illinois Board*, *supra*:

> [O]ur previous opinions have also emphasized that "even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty . . . and we have required that States adopt the least drastic means to achieve their ends. . . . This requirement is particularly important where restrictions on access to the ballot are involved.

440 U.S. at 185 (citations omitted). *See also McCarty* v. *Austin*, 423 F. Supp. 990, 997 (W.D. Mich. 1976).

In the Court's view, R.C. 3513.257 fails the test of precision which it so clearly is required to pass under the doctrine set forth above. The State has advanced no compelling reason for requiring an independent candidate to meet a filing deadline 75 days before a primary election in which he does not participate, and which is some 229 days before the general election.

The State argues that because partisan candidates are required to file at the same time as independents, the early deadline is justified because it treats all candidates "equally." Again, the superficial appeal of this argument fails under scrutiny. First of all, the deadline, set 75 days before the *primary* election, is arguably a reasonable one for the candidates who decide to run in that race. However, the Court cannot find any legitimate state interest in tying an *independent* candidate to that deadline.

The defendant claims that permitting an independent to declare later than party candidates would allow the independent to play "dog in a political manger" by withholding his candidacy until after party candidates are chosen in the primaries. Even assuming that this apprehension has some foundation in a *statewide* election, *see e.g.*, *Sweetenham* v. *Rhodes*, 318 F. Supp. 1262, 1273 (S.D. Ohio 1970), which the Court need not now decide, such concern is substantially diminished in a national election where the party candidates are not chosen until July or August and where all candidates must respond to national, not just state, issues. In any event, the Court is not persuaded that the states have a compelling interest in preventing candidates as early as March 21 from emerging and declaring in response to important newly-arising issues, particularly when such candidates may well reflect the conscience of a substantial number of voters. Of course in the context of a presidential election the political parties have an opportunity to respond to such shifting and emerging national issues after the State's filing deadline because they do not name their candidate or establish the party platform until the conventions in late summer.

The Court does not quarrel with the proposition that states generally have an important interest in maintaining their ballots within manageable and understandable limits:

> A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidates' desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. That no device can be conjured to eliminate every frivolous candidacy does not undermine the State's effort to eliminate as many such as possible.

Lubin v. *Panish*, *supra*, 415 U.S. at 715. Equally important, however, is the concern that access to the ballot

of "serious" candidates not be unduly restricted. A State must strike a balance between its interest in maintaining a manageable ballot and its duty to provide access thereto for serious candidates:

> The means of testing the seriousness of a given candidacy may be open to debate; the fundamental importance of ballots of reasonable size limited to serious candidates with some prospects of public support is not. Rational results within the framework of our system are not likely to be reached if the ballot for a single office must list a dozen or more aspirants who are relatively unknown or have no prospects of success.
>
> This legitimate state interest, however, must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity. The interests involved are not merely those of parties or individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of voters.

Id. at 715-716.

From the above perspective, Ohio's system for regulating ballot access is less than a model of precision. The State's extremely lenient signature requirements allow ready access to the general election by virtually any candidate seeking a place thereon, yet its early filing deadline can have the effect, as it does here, of arbitrarily interdicting the access of a candidate with undisputed wide community support.

It appears that the State could more effectively strike the required balance by screening the "frivolous" inde-

pendent candidates for President by, for example, gauging their community support with stricter nominating signature requirements and then moving the filing deadline to a date closer to the general election, thereby making less drastic the present bar to the ballot erected by R.C. 3513.257. Such an alteration is of course a matter for the Ohio legislature and not this Court. What *is* for this Court, however, is the decision whether the deadline set by R.C. 3513.257, as applied to independent candidates for President, passes constitutional muster. Because I find, as detailed above, that the impediment set in the path to the ballot of such candidates by R.C. 3513.257 is unduly restrictive and not justified by any compelling state interest, the statute is constitutionally infirm.

Conclusion

In conclusion, the Court holds that R.C. 3513.257 substantially abridges the constitutional rights of association of Anderson and his supporters and the fundamental right to vote of his supporters. It also discriminates against independent candidates and in favor of partisan candidates. Neither the abridgment nor the discrimination are justified by compelling state interests.

It is not the prerogative for this Court to establish a particular filing date which in its judgment would pass constitutional muster. That is a decision for the Ohio General Assembly in the first instance. The Court merely holds that the filing date of March 20, or 75 days before the June primary, is too early in the election year to be justified by a compelling state interest and to be the least restrictive means to achieve the interests it purportedly does serve. Under the circumstances, the Court will grant the plaintiffs the relief they seek and leave to the Ohio legislature the task of establishing a date which serves compelling interests without unnecessarily restricting constitutionally protected liberty.

ORDER OF DISTRICT COURT
(annexed to Opinion)

ORDER

The motion for summary judgment of defendant Anthony J. Celebrezze, Jr. is DENIED; the motion for preliminary injunction of the plaintiffs is now moot and is therefore DENIED; and plaintiffs' motion for summary judgment is GRANTED.

It is ADJUDGED and DECREED that R.C. 3513.257, as applied to plaintiffs Anderson and Hetrick, is violative of plaintiffs' rights to political association under the First and Fourteenth Amendments to the United States Constitution, and is violative of plaintiffs' rights to equal protection under the Fourteenth Amendment to the United States Constitution. The Clerk of Courts shall enter judgment for the plaintiffs.

It is hereby ORDERED that the defendant Secretary of State accept and process the plaintiffs' petition and other documents as if timely filed under R.C. 3513.257. It is further ORDERED that the defendant cause Anderson's name to appear on the Ohio ballot in the November 4, 1980, presidential general election, if aside from R.C. 3513.257 he has otherwise met the requirements of Ohio's election laws.

/s/ Robert M. Duncan
ROBERT M. DUNCAN, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C-2-80-400

JUDGE DUNCAN

JOHN B. ANDERSON, *et al.*,
2711 Highcrest Road
Rockford, Illinois 61107
Plaintiffs,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as
Secretary of State of the State of Ohio
30 East Broad Street
Columbus, Ohio 43215,
Defendant.

JOINT STIPULATION OF FACT

The parties agree, by and through their counsel, that the following facts are stipulated to be true and correct, for the purposes and only for the purposes of this case,[1]

[1] Some of the facts contained in this stipulation are in the peculiar knowledge of one party and have been provided to the other party; in these instances, the other party may have no independent knowledge of such facts but is agreeing not to contest them for the purposes of this action. For example, many of the facts describing the Anderson candidacy are not within the independent knowledge of the Secretary of State; they are, however, taken substantially verbatim from facts admitted into evidence in the record by a federal court judge at a trial conducted on June 6, 1980, *Anderson, et al.* v. *Bolger, et al.*, Civil Action No. 30-0340, E.D. N.Y.

but the parties reserve all objections on the grounds of relevancy.

1. John B. Anderson seeks to run as an independent candidate for President of the United States in the 1980 general election and meets the qualifications prescribed in the Constitution for election to that office.

2. George H. Hetrick is a duly registered voter in the State of Ohio who has been designated to seek certification as a candidate for Presidential elector in the 1980 general election pledged to the candidacy of plaintiff Anderson. His name was included on a slate of candidates for Presidential electors, pledged to support the independent candidacy of plaintiff Anderson, tendered to defendant Celebrezze on May 16, 1980. Plaintiff Hetrick meets the qualifications prescribed in the Constitution for election to the office of elector.

3. Leslie Laufman, M.D., is a duly registered voter in the State of Ohio who wishes to cast her vote in the 1980 general election for the slate of electors pledged to plaintiff Anderson.

4. Gerald M. Eisenstat is a duly registered voter in the State of New Jersey, in which plaintiff Anderson's name has already been certified to appear on the ballot in the 1980 general election as an independent candidate for President of the United States. Plaintiff Eisenstat intends to cast his vote in the 1980 general election for the slate of electors pledged to plaintiff Anderson in New Jersey.

5. Defendant Anthony J. Celebrezze, Jr., is the Secretary of State of the State of Ohio. As such, he is charged by law with responsibility for the administration of elections in Ohio, including the procedures by which, among other things (i) nominating petitions filed by independent candidates for President and Vice-President are received by the State of Ohio and transmitted to the appropriate

county Boards of Election of the State of Ohio for verification of the signatures contained therein, and (ii) the names of independent candidates who have been duly nominated for the offices of President and Vice-President are certified to all county Boards of Election for inclusion on the official ballot in the general election.

6. On April 24, 1980, plaintiff Anderson publicly announced his intention to pursue an independent candidacy for the office of President of the United States. At the same time, he publicly renounced his previously declared intention to seek the Republican Party's nomination for that office, although stating that he would remain a member of the Republican party, and filed with defendant Celebrezze a Notice of Withdrawal of Consent which resulted in his name being removed from the ballot of the Ohio Republican Party primary scheduled to be held on June 3, 1980.

7. The listing of plaintiff Anderson's name on the 1980 general election ballot will not be barred by the provision set forth in the last sentence of Ohio Revised Code Section 3513.04.

8. Following plaintiff Anderson's announcement on April 24, supporters of his Presidential candidacy throughout the United States began making efforts intended to place his name as an independent candidate for President on the ballots of every state of the union in the November, 1980 general election.

9. Following plaintiff Anderson's announcement, a group of his supporters in Ohio began to secure the necessary signatures of registered Ohio voters to place plaintiff Anderson's name on the Ohio ballot in the 1980 general election as an independent candidate for President. Between May 10 and 15, 1980, supporters of plaintiff Anderson secured approximately 16,000 signatures of persons purporting to be Ohio registered voters. Under Ohio law, 5,000 valid signatures are required.

10. On May 16, 1980, supporters of plaintiff Anderson presented to the Secretary of State (i) a Statement of Candidacy by Plaintiff Anderson, (ii) Nominating Petitions containing approximately 14,500 signatures of persons purporting to be eligible Ohio voters, (iii) a full slate of candidates for President electors, including the name of plaintiff Hetrick, pledged to support the candidacy of plaintiff Anderson, and (iv) payment of $100 as filing fees for candidates for President and Vice-President. All of the materials described above in this paragraph which were tendered to defendant on May 16, 1980, including a certificate of candidacy bearing plaintiff Anderson's original signature, are contained in a box under seal dated June 7, 1980, and initialed by counsel for the parties herein.

11. Plaintiff Anderson's Statement of Candidacy and Nominating Petition would have been accepted for filing but for the fact that they were not filed within the time required by Ohio Revised Code Section 3513.257.

12. Defendant Celebrezze, to whom the foregoing papers were tendered, failed and refused to accept the Statement of Candidacy, Nominating Petitions, slate of candidates for Presidential Electors, and filing fees on the sole ground that they were not timely filed under Section 3513.257. At the time the supporters of plaintiff Anderson tendered the papers, they received a letter from the Secretary of State, a true, accurate, and authentic copy of which is attached hereto as Exhibit "A."

13. The results of several recent public opinion polls conducted by nationally recognized polling organizations are reported in the attached exhibits:

Exhibit B:

An ABC News-Harris Survey poll conducted during the period April 26-30 which was broadcast on national network television news and reported in many newspapers;

Exhibit C:

A Yankelovich, Skelly and White, Inc. survey poll conducted between May 14 and May 16, 1980 for TIME Magazine which was published in the June 2, 1980 edition of Time and elsewhere;

Exhibit D:

A Field Poll, conducted in mid-May in California, reported in the *New York Times* and elsewhere;

Exhibit E:

An Associated Press-ABC News "Exit Poll" conducted on June 3, 1980 in which major party voters who voted in the primaries in Ohio, California and New Jersey were interviewed as they left the polling place, reported on ABC national network television news and on the AP "A" wire;

Exhibit F:

A *New York Post* poll, conducted beginning May 17, and reported in the *New York Post* on June 6, 1980.

14. During his campaign for the Republican party nomination for President, plaintiff Anderson qualified for federal matching funds by raising the minimum required amount of money ($2000) in each of 10 States from the required number of contributors. Prior to April 24, 1980, he raised a total of $3,908,571 of private contributions, and $40,469 from duly registered political action committees which, with matching funds of $2,680,347, amounted to $6,629,387. Plaintiff Anderson spent all but $307,000 of his federal matching funds, which sum was returned to the Federal Election Commission when he ended his Republican campaign. Prior to April 24, Congressman Anderson was on the ballot in nine Republican primaries where he received percentages of the vote ranging from approximately 9% in Georgia and Florida to approxi-

mately 31% in Massachusetts and 37% in Illinois. In addition, he had an active campaign organization in a number of states in which delegates were chosen other than by primary. In total, he had acquired 55 delegates.

15. In addition to their efforts in Ohio, supporters of plaintiff Anderson have, since April 24 and as of June 9, gathered the requisite number of signatures (if valid) in ten states to place plaintiff Anderson's name on the ballot as an independent candidate for President. Campaign workers, paid and volunteer, have participated in these petition drives, and over 300,000 persons have signed the petitions in these states and others where petition drives are ongoing. The following is a brief summary of the petition activity as of May 30, 1980:

State	Date Signatures Were Filed	Number of Signatures Required	Approximate No. of Signatures Actually Filed
New Jersey	4/23/80	800	4,000
Michigan	5/05/80	18,339	62,252
Massachusetts	5/06/80	39,245	101,000
Utah	5/12/80	300	2,000
North Carolina	5/15/80	10,000	27,003
Ohio	5/16/80	5,000	14,500*
Kentucky	5/27/80	5,000	8,600
Kansas	5/21/80	2,500	6,000
8 States	—	81,184	225,455

* Petitions tendered but refused by Secretary of State.

In addition, by June 9, Anderson supporters had gathered more than the required number of signatures (if valid) in Maine (minimum of 4,000 and maximum of 6,000 required; 8,000 collected, 5900 to be filed on June 9), New Mexico (17,274 required; over 32,000 gathered) and West Virginia (7,510 required; 11,159 filed).

16. Additionally, plaintiff Anderson's campaign currently has active petition drives underway in Wisconsin, Illinois, Georgia, Idaho, Maryland, Missouri, Oklahoma, Texas, and Nevada.

17. The campaign intends to try to obtain and file the requisite number of signatures to qualify for the ballot in all the remaining jurisdictions in the United States as quickly as possible.

18. Plaintiff Anderson has filed suit in federal court in Kentucky challenging the constitutionality of that state's deadline. In addition to Ohio and Kentucky, the Anderson campaign intends to institute or participate in litigation challenging pre-April 24 filing deadlines in each of the three other states which have such deadlines, if necessary to seek to place plaintiff Anderson's name on the ballot in those states. In addition, Anderson has participated in a suit in the Supreme Court of West Virginia challenging that state's geographical distribution requirements for petition signatures, and in litigation instituted in federal court in the Eastern District of New York claiming that the extension by Congress of a lower postal rate for bulk third-class mail to the Democratic and Republican parties but not to plaintiff Anderson's campaign is unconstitutional.

19. Between April 24, 1980 and June 3, 1980, in a period of five weeks, the National Unity Campaign for John Anderson has raised over $1,300,000 in private contributions from all 50 states and the District of Columbia in amounts of $1,000 or less (as required by law) from over 40,000 individual contributors.

20. Between April 24, 1980 and June 3, 1980, the campaign has established 63 offices in 35 States. New offices are being established daily, and in the next 30-60 days the campaign anticipates that it will have offices open in all 51 jurisdictions. The campaign currently employs approximately 150 people in the National headquarters in Washington and in other offices throughout the country with a monthly payroll of approximately $100,000. Additionally, the campaign has signed a nationwide phone agreement with the Illinois Bell Telephone Company to provide the campaign efficient telephone service in all 51

jurisdictions. The sum of $150,000 has been deposited in the D.C. National Bank in an irrevocable letter of credit, from which Illinois Bell covers the campaign's various deposit and installation costs.

21. After the March 20 filing deadline specified by Section 3513.257 and until shortly after the June primary, Ohio law does not impose upon the Secretary of State or his agents, and he or his agents do not undertake, any administrative tasks with respect to filed nominating petitions for independent candidates.

22. On June 8, 1979, Plaintiff Anderson declared his intention to seek the nomination of the Republican Party for President of the United States.

23. For nearly twenty years, plaintiff Anderson has served as a Republican member of the U.S. Congress from Illinois' 16th Congressional District. He is serving in his tenth term as a Member of Congress from that district, having run for and been elected as a Republican every two years beginning in 1960. In 1956, he ran as a Republican for, and was elected to office as, Winnebago (Illinois) County State's Attorney. He had never sought elective office as an independent prior to April 24, 1980, and he has never sought elective office as the candidate of any political party other than the Republican Party.

24. Prior to April 24, 1980, plaintiff Anderson's name appeared or was scheduled to appear on the ballots of 27 of the 36 states that hold Republican primary elections. Nine of these primaries were held prior to April 24. Plaintiff did not win any of these nine primaries. In 8 of these 9 primaries in which delegate votes were awarded, plaintiff received 55 of the 356 delegates awarded, 26 of which were in his home state. This was 28% of the delegates awarded in his home state. Attached hereto as Exhibit G is a chart showing pre-April 22 primary results. The only additional primary prior to April 24

was that of Pennsylvania, in which Anderson was not entered and in which 83 delegates were awarded.

25. Supporters of Plaintiff Anderson for the Republican nomination for President engaged in at least some activity in support of his candidacy in the remaining 14 states which select delegates to the Republic National Convention by caucus or convention.

26. After plaintiff Anderson determined to run for President as an independent on April 24, 1980, his name appeared on the Republican primary ballot for President in twelve states and the District of Columbia. In five states where his name had been scheduled or certified to appear, his name was withdrawn from the ballot prior to the Republican primary election.

27. In order to qualify as a Presidential candidate in the Republican primaries for the states listed below, Plaintiff Anderson had to obtain sufficient signatures on petitions. The signatures were obtained during the time periods indicated in the number indicated and filed on the date indicated.

State	No. of Signatures	Time Period During Which Gathered	Date Filed
New Hampshire	about 1,500	one month	late Dec. 1979
Illinois	about 15,000	one month or less	Dec. 31, 1979
Vermont	about 300	two weeks	Feb. 12, 1980
Indiana	7,517	two weeks	March 7, 1980
Montana	about 4,000	two weeks	March 15, 1980
Ohio	about 7,350	March 13-20, 1980	March 20, 1980

28. Plaintiff Anderson gathered approximately 16,000 signatures in 86 of Ohio's 88 counties during a five-day period from May 10 to May 15, 1980 in an effort to file nominating petitions to run for President as an independent.

29. Ten of the twenty-two persons coordinating plaintiff Anderson's candidacy as an independent for President in Ohio performed similar functions in connection with

his Republican candidacy for President in Ohio, including Diane Hetrick who is now his Ohio Coordinator and was his Southern Ohio Coordinator when he was a Republican candidate, William Massuros who is now his Ohio Field Coordinator and was a Traveling Coordinator when he was a Republican candidate, and Eric Brass who is now a Cincinnati Coordinator and was a Traveling Coordinator when he was a Republican candidate.

30. In 1980, five candidates submitted sufficient signatures, if determined valid, to qualify as independent candidates for President of the United States:

Candidate	No. of Signatures Filed	Date of Filing
Richard E. Congress	11,022	12/18/79
Deirdre Griswold	10,001	3/13/80
Ed Clark	9,944	3/18/80
Gus Hall	9,730	3/19/80
Barry Commoner	10,331	3/20/80

Gus Hall has already been determined not to qualify for the ballot because not one of his certificates of candidacy contained his original signature, and the law requires at least one original signature on a certificate of candidacy.

31. In 1980, two candidates submitted sufficient signatures, if determined valid, to qualify as independent candidates for the United States Senate:

Candidate	No. of Signatures Filed	Date of Filing
John E. Powers	10,475	12/18/79
Rick Nagin	8,080	3/19/80

Rick Nagin has already been determined not to qualify for the ballot because not one of his certificates of candidacy contained his original signature, and the law requires at least one original signature on a certificate of candidacy.

32. In 1978, three independent candidates for the office of Governor filed timely nominating petitions and appeared on the general election ballot in Ohio.

33. In 1976, five independent candidates for President of the United States and three independent candidates for the United States Senate filed timely nominating petitions and appeared on the general election ballot in Ohio.

34. In 1974, one independent candidate for Governor and two independent candidates for the United States Senate filed timely nominating petitions and appeared on the general election ballot in Ohio.

35. In 1978, the number of votes cast for Governor in Ohio was 2,843,351.

36. In 1976, the number of votes cast for President of the United States in Ohio was 4,111,873, and the number of votes cast for United States Senator was 3,920,613.

37. In 1974, the number of votes cast for Governor in Ohio was 3,072,010, and the number of votes cast for United States Senator was 2,987,606.

38. Because records with respect to such matters are not kept and/or because such records cannot easily be obtained and analyzed, it is impossible to determine with any accuracy how many, if any, independent candidates for any office in Ohio either (i) filed and were rejected for any reason, or (ii) were deterred from seeking nomination by petition, through the procedures set forth by state law, in any given prior year.

39. The following is a description of the process through which candidates seeking the nomination of the Republican or Democratic party (or any third party candidate where the party has qualified under Ohio Revised Code Section 3517.01(A)) have their names appear on their respective party primary ballot and how the winners' names, along

with the names of independent candidates, are placed upon the general election ballot:

1. Seventy-five days prior to the primary election, all presidential candidates wishing to run as independents in the general election file their nominating petitions with the Secretary of State, while all presidential candidates wishing to run in a party primary have Declarations of Candidacy in Support of their Candidacy filed with the Secretary of State. The Declaration of Candidacy includes a petition which must be signed by one thousand registered electors who are members of the same political party as the proposed presidential candidate. These requirements are established by Ohio Revised Code Sections 3513.05, 3513.12 and 3513.257.

2. Upon the Secretary of State's receiving the Declarations of Candidacy, the part-petitions are separated by county and mailed to the respective county Boards of Election in order to have the signatures upon the petitions verified. It takes approximately three days to prepare and ship all petitions from the Secretary of State's office.

3. Since the county has to check each signature on every petition, the turnaround time is approximately five to eight working days.

4. The last day to file a Protest against a party candidate is sixty-five days prior to the primary election. Upon receiving a protest, the Secretary of State immediately fixes the time and place for a hearing. Notice of the hearing is sent to the candidate, the individual who filed the protest, and to all other interested parties. The hearing is conducted by the Secretary of State who must determine whether or not the Declaration of Candidacy is valid. His determination is final. Because of the deadlines for certifying the form of the ballot, the hearing and the rendering of a decision on a protest must be completed within two or three days of the filing of the protest.

5. Sixty days prior to the primary election, the Secretary of State is required to certify to the Boards of Elections the form of the official ballots for the primary election. In order to certify the forms of the ballots the Secretary of State's office must get the names of all candidates to the state printer. Since signature verification runs almost to the very day when the ballot form must be prescribed, the Secretary of State anticipates verification and begins work with the state printer in order to have galley proofs completed on or before the sixty-fifth day prior to the election. Proofing of the galley usually takes two to three working days, while printing of the final copy cannot be completed in less than three days. The entire process of getting the names of the candidates to the state printer, obtaining a galley proof of the proposed ballot, editing it and then having a finished printed sample ballot takes approximately ten working days.

6. During the time that the Secretary of State is certifying the presidential candidates' ballots, the Boards of Elections are obtaining bids from their printers on the proposed ballots. As soon as the official ballot are received from the Secretary of State's office, the Boards begin work on the rotation patterns. Most Boards are able to complete those within one or two days. As soon as a Board completes the rotation pattern, it sends the names of all the candidates within that county to its printer. It takes between eighteen to twenty-two days to receive the completed, printed ballot. The printer must prepare a galley proof and return it to the Board where it is edited. The Boards also sends a copy of the galley to the Secretary of State for his approval. The galley must be checked for correct spelling of all candidate's names, for correct office and title designations, for correct print size and for proper rotation. It is rare when a Board can meet the statutory deadline (forty-five days prior to the election) for the mailing of absentee ballots. Normally absentee ballots are mailed seven to ten days late. It is important

at this juncture to note that overseas absentee ballots must be mailed at least thirty days prior to the election in order for the voter to be able to vote the ballot and timely return it.

7. On the day that the ballots are delivered from the printer, a Board immediately begins setting its voting machines. In Franklin County, for example, seven crews are used full-time and they usually complete the tasks one or two days before the election. The voting machines must be pulled and the ballots inserted. The machines then are programmed to the appropriate ballot and the counters are all set back to zero. The machine is then locked and sealed. Election crews are restricted as to the number of voting machines they can process daily because many machines are stored in public buildings which close at 4:30 to 5:30 p.m. A crew can average fifteen to eighteen machines a day.

8. Immediately after the primary election, the nominating petitions for independent candidates for President and Vice-President are sent to the respective Boards of Elections for signature verification. Normally the petitions are mailed to the various Boards of Election on the Monday or Tuesday after the primary election. As in the case of Declarations of Candidacy, the signature verification process takes approximately five working days. All petitions must be open to inspection from June 15 to June 30. Protest against the nominating petitions may be filed up to and including the 30th day of July.

9. As soon as the names of all Presidential candidates are ascertained, which is no sooner than the completion of the nominating process at the Republican and Democratic national conventions, the official ballot is prepared by the Secretary of State and sent to the State printer. Thereafter, the presidential ballot is mailed to the Boards of Elections. From that time on, the process is identical to that established for the primary.

Attached hereto and incorporated herein as Exhibit H is the Ohio 1980 Election Calendar prepared for public distribution by the Ohio Secretary of State.

Respectfully submitted,

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[Note: Exhibits have not been reproduced.]

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION, ART. II, § 1, CLS. 2, 4

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

* * * *

The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

* * * *

U.S. CONSTITUTION, ART. VI, CL. 2

* * * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

* * * *

U.S. CONST., AMEND. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * *

U.S. CONST. AMEND. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

OHIO REV. CODE ANN., § 3513.04 (Page 1981)

[Declaration of candidacy.]

Candidates for party nominations to state, district, county and municipal offices or positions for which party nominations are provided by law, and for election as members of party controlling committees shall have their names printed on the official primary ballot by filing a declaration of candidacy and paying the required filing fee, except that the joint candidates for party nomination to the offices of governor and lieutenant governor shall, for the two of them, file one declaration of candidacy and pay one filing fee.

The secretary of state shall not accept for filing the declaration of candidacy of a candidate for party nomination to the office of government unless the declaration of candidacy also shows a joint candidate for the same party's nomination to the office of lieutenant governor, shall not accept for filing the declaration of candidacy of a candidate for party nomination to the office of lieutenant governor unless the declaration of candidacy also shows a joint candidate for the same party's nomination to the office of governor, and shall not accept for filing a declaration of candidacy that shows a candidate for party nomination to the office of governor or lieutenant governor who has already been shown as a candidate for party nomination to the office of governor or lieutenant governor on a declaration of candidacy previously filed and accepted for the same primary election.

No person who seeks party nomination for an office or position at a primary election by declaration of candidacy shall be permitted to become a candidate at the following general election for any office by nominating petition or by write-in.

OHIO REV. CODE ANN., § 3513.041 (Page 1981) Write-in space required; declaration of intent of write-in candidate.

A write-in space shall be provided on the ballot for every office, but write-in votes shall not be counted for any candidate who has not filed a declaration of intent to be a write-in candidate pursuant to this section. A qualified person who has filed a declaration of intent may receive write-in votes at either a primary or general election. Any candidate, except one whose candidacy is to be submitted to electors throughout the entire state, shall file a declaration of intent to be a write-in candidate before four p.m. of the fortieth day preceding the election at which such candidacy is to be considered. If the election is to be determined by electors of a county or a district or subdivision within the county, such declaration shall be filed with the board of elections of that county. If the election is to be determined by electors of a subdivision located in more than one county, such declaration shall be filed with the board of elections of the county in which the major portion of the population of such subdivision is located. If the election is to be determined by electors of a district comprised of more than one county but less than all of the counties of the state, such declaration shall be filed with the board of elections of the most populous county in such district. Any candidate for an office to be voted upon by electors throughout the entire state shall file a declaration of intent to be a write-in candidate with the secretary of state before four p.m. of the fortieth day preceding the election at which such candidacy is to be considered. In addition, candidates for president and vice-president of the United States shall also file with the secretary of state by said fortieth day

a slate of presidential electors sufficient in number to satisfy the requirements of the United States constitution.

* * * *

OHIO REV. CODE ANN., § 3513.05 (Page 1981) Declarations of candidacy; certification of ballot forms.

Each person desiring to become a candidate for a party nomination or for election to an office or position to be voted for at a primary election, except persons desiring to become joint candidates for the offices of governor and lieutenant governor, shall, not later than four p.m. of the seventy-fifth day before the day of the primary election, file a declaration of candidacy and petition and pay the fee required by section 3513.10 of the Revised Code. The declaration of candidacy and all separate petition papers shall be filed at the same time as one instrument. When the offices are to be voted for at a primary election, persons desiring to become joint candidates for the offices of governor and lieutenant governor shall, not later than four p.m. of the seventy-fifth day before the day of the primary election, comply with section 3513.04 of the Revised Code. The prospective joint candidates' declaration of candidacy and all separate petition papers of candidacies shall be filed at the same time, as one instrument.

If the declaration of candidacy declares a candidacy which is to be submitted to electors throughout the entire state, the petition, including a petition for joint candidates for the offices of governor and lieutenant governor, shall be signed by at least one thousand qualified electors who are members of the same political party as the candidate or joint candidates and the declaration of candidacy and petition shall be filed with the secretary of state; provided that the secretary of state shall not accept or file any such petition appearing on its face to contain signatures of more than three thousand electors.

* * * *

OHIO REV. CODE ANN. § 3513.12 (Page 1981) National convention delegates.

At the primary election which shall be held on the first Tuesday after the first Monday in June in the year 1976, and similarly in every fourth year thereafter, delegates and alternates to the national conventions of the different major political parties shall be chosen by direct vote of the electors as provided in this chapter. Candidates for delegate and alternate shall be qualified and the election shall be conducted in the manner prescribed in this chapter for the nomination of candidates for state and district offices, except as provided in section 3513.151 [3513.15.1] of the Revised Code and except that whenever any group of candidates for delegate at large or alternate at large, or any group of candidates for delegates or alternates from districts, file with the secretary of state statements as provided by this section, designating the same persons as their first and second choices for president of the United States, such a group of candidates may submit a group petition containing a declaration of candidacy for each of such candidates. The group petition need be signed only by the number of electors required for the petition of a single candidate. No group petition shall be submitted except by a group of candidates equal in number to the whole number of delegates at large or alternates at large to be elected or equal in number to the whole number of delegates or alternates from a district to be elected.

Each person seeking to be elected as delegate or alternate to the national convention of his political party shall file with his declaration of candidacy and certificate a statement in writing signed by him in which he shall state his first and second choices for nomination as the candidate of his party for the presidency of the United States. The secretary of state shall not permit any declaration of candidacy and certificate of a candidate for election as such delegate or alternate to be filed unless accompanied by such statement in writing. The name of

a candidate for presidency shall not be so used without his written consent.

A person who is a first choice for president of candidates seeking election as delegates and alternates shall file with the secretary of state, prior to the day of the election, a list indicating the order in which certificates of election are to be issued to delegate or alternate candidates to whose candidacy he has consented, if fewer than all of such candidates are entitled under party rules to be certified as elected. Each candidate for election as such delegate or alternate may also file along with his declaration of candidacy and certificate a statement in writing signed by him in the following form:

Statement of candidate for election
(delegate)

as to the (here insert name of
(alternate)

political party) national convention.

I hereby declare to the voters of my political party in the state of Ohio that, if elected as
(delegate)

to their national party convention,

(alternate)
I shall, to the best of my judgment and ability, support that candidate for president of the United States who shall have been selected at this primary by the voters of my party in the manner provided in this chapter, as their candidate for such office.

_____

For signature of candidate for delegate / alternate

• • • •

OHIO REV. CODE ANN., § 3513.257 (Page 1981) Independent candidates' petitions for nomination at primary elections.

Each person desiring to become an independent candidate for an office for which candidates may be nominated at a primary election, except persons desiring to become independent joint candidates for the offices of governor and lieutenant governor, shall file no later than four p.m. of the seventy-fifth day before the day of the primary election immediately preceding the general election at which such candidacy is to be voted for by the voters, a statement of candidacy and nominating petition as provided in section 3513.261 [3513.26.1] of the Revised Code. Persons desiring to become independent joint candidates for the offices of governor and lieutenant governor shall file, not later than four p.m. of the seventy-fifth day before the day of the primary election, one statement of candidacy and one nominating petition for the two of them. The prospective independent joint candidates' statement of candidacy shall be filed with the nominating petition as one instrument. The nominating petition shall contain signatures of qualified electors of the district, political subdivision, or portion of a political subdivision in which the candidacy is to be voted for in an amount to be determined as follows:

(A) If the candidacy is to be voted for by electors throughout the entire state, the nominating petition, including the nominating petition of independent joint candidates for the offices of governor and lieutenant governor, shall be signed by no less than five thousand qualified electors, provided that no petition shall be accepted for filing if it purports to contain more than fifteen thousand signatures.

* * * *

All nominating petitions of candidates for offices to be voted by electors throughout the entire state shall be filed in the office of the secretary of state. No nominating

petition for the offices of president and vice-president of the United States shall be accepted for filing unless there is submitted to the secretary of state, at the time of filing the petition, a slate of presidential electors sufficient in number to satisfy the requirements of the United States constitution. The secretary of state shall not accept for filing the statement of candidacy of a person who desires to be an independent candidate for the office of governor unless it also shows the joint candidacy of a person who desires to be an independent candidate for the office of lieutenant governor, shall not accept for filing the statement of candidacy of a person who desires to be an independent candidate for the office of lieutenant governor unless it also shows the joint candidacy of a person who desires to be an independent candidate for the office of governor, and shall not accept for filing the statement of candidacy of a person who desires to be an independent candidate to the office of governor or lieutenant governor who has already been shown as an independent candidate for governor or lieutenant governor on a statement of candidacy previously filed and accepted during the filing period preceding the same primary election.

* * * *

No petition other than the petition of a candidate whose candidacy is to be considered by electors throughout the entire state shall be accepted for filing if it appears on its face to contain more than five times the minimum number of signatures. * * *

OHIO REV. CODE ANN., § 3513.30 (Page 1981) Withdrawal of candidacy.

Where only one valid declaration of candidacy is filed for nomination as a candidate of a political party for an office and such candidate dies prior to the tenth day before the primary election, the vacancy so created may be filled by said political party by the same committee in the same manner as provided in the first five paragraphs of section 3513.31 of the Revised Code for the filling of similar

vacancies created by withdrawals after the primary election, except that the certification, when filling a vacancy created by death of a candidate prior to the primary election, may not be filed with the secretary of state, or with a board of the most populous county of a district, or with the board of a county in which the major portion of the population of a subdivision is located, later than four p.m. of the tenth day before the day of such primary election, or with any other board later than four p.m. of the fifth day before the day of such primary election.

Any person filing a declaration of candidacy may withdraw as such candidate at any time prior to four p.m. of the sixty-fifth day before the primary election. If such candidate's declaration of candidacy was filed with the secretary of state, his statement of withdrawal shall be addressed to and filed with the secretary of state. If such candidate's declaration of candidacy was filed with a board of elections, his statement of withdrawal shall be addressed to and filed with such board.

A person who is the first choice for president of the United States by a candidate for delegate or alternate to a national convention of a political party may withdraw his consent for his selection as such first choice no later than four p.m. of the thirtieth day before the day of the primary election. Withdrawal of consent shall be for the entire slate of candidates for delegates and alternates who named such person as their presidential first choice and shall constitute withdrawal from the primary election by such delegates and alternates. The withdrawal shall be made in writing and delivered to the secretary of state. The boards of elections shall remove both the name of the withdrawn first choice and the names of such withdrawn candidates from the ballots to the extent practicable in the time remaining before the election and according to the directions of the secretary of state. If such names are not removed from all ballots before the day of the election, the votes for the withdrawn first choice or candidates are void and shall not be counted.

Any person nominated in a primary election or by nominating petition as a candidate for election at the next general election may withdraw as such candidate at any time prior to the sixty-fifth day before the day of such general election. Such withdrawal may be effected by the filing of a written statement by such candidate announcing his withdrawal and requesting that his name not be printed on the ballots. If such candidate's declaration of candidacy or nominating petition was filed with the secretary of state, his statement of withdrawal shall be addressed to and filed with the secretary of state. If such candidate's declaration of candidacy or nominating petition was filed with a board of elections, his statement of withdrawal shall be addressed to, and filed with such board.

* * * *

OHIO REV. CODE ANN., § 3505.10 Presidential ballot.

On the presidential ballot below the stubs at the top of the face of the ballot shall be printed "Official Presidential Ballot" centered between the side edges of the ballot. Below "Official Presidential Ballot" shall be printed a heavy line centered between the side edges of the ballot. Below the line shall be printed "Instruction to Voters" centered between the side edges of the ballot, and below such words shall be printed the following instructions:

* * * *

Below such instructions to the voter shall be printed a single vertical column of enclosed rectangular spaces equal in number to the number of presidential candidates plus one additional space for write-in candidates. Each of such rectangular spaces shall be enclosed by a heavy line along each of its four sides, and such spaces shall be separated from each other by one-half inch of open space.

In each of such enclosed rectangular spaces, except the space provided for write-in candidates, shall be printed the names of the candidates for president and vice-president nominated as such by the national convention of a political party to which delegates and alternates were elected in this state at the next preceding primary election, and the names of those independent candidates nominated by petition in accordance with section 3513.257 [3513.25.7] of the Revised Code. The names of candidates for electors of president and vice-president shall not be placed on the ballot, but shall be certified to the secretary of state as required by sections 3513.11 and 3513.257 [3513.25.7] of the Revised Code. The names of candidates for president and vice-president may be certified to the secretary of state, for placement on the presidential ballot, by authorized officials of an intermediate or minor political party which has held a state or national convention for the purpose of choosing such candidates, or which may, without convention, certify such candidates in accordance with the procedure authorized by its party rules. Certification to the secretary of state of such candidates shall be made on or before the seventy-fifth day before the day of the general election and shall be accompanied by designation of a sufficient number of presidential electors to satisfy the requirements of law. A vote for any of such candidates for president and vice-president shall be a vote for the electors of such candidates whose names have been certified to the secretary of state.

* * * *

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 80-1551

JOHN B. ANDERSON, *et al.*,
Plaintiffs, Appellees,

v.

RODNEY S. QUINN, *etc.*,
Defendant, Appellant.

Before COFFIN, Chief Judge,
CAMPBELL and BOWNES, Circuit Judge

MEMORANDUM AND ORDER

Entered: September 17, 1980

Having reviewed the memoranda of the parties, the transcript of the hearing of the district court, and the opinion of that court, we affirm the declaratory judgment and injunction of August 11, 1980. Whether the standard be compelling state interest or something slightly more elastic, we agree that Maine has not justified the ballot restriction in question for reasons set forth in the district court's opinion of the same date.

Mandate is to issue forthwith.

By the Court:

/s/ Dana H. Gallub
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

Civil No. 80-0176 P

JOHN B. ANDERSON, STEPHEN P. KELLEY, JAMES D. HARRINGTON, and GERALD M. EISENSTAT,
Plaintiffs,

v.

RODNEY S. QUINN, in his official capacity as Secretary of State of the State of Maine
Defendant.

OPINION AND ORDER OF THE COURT

GIGNOUX, J.

Congressman John B. Anderson is an independent candidate for President of the United States in the November 1980 general election. He declared his independent candidacy on April 24, 1980. In this action Anderson and three of his supporters [1] challenge the constitutionality of a Maine statute, 21 Me. Rev. Stat. Ann. § 494(9), which requires an independent candidate for President of the United States to file a nominating petition with the Secretary of State of Maine by April 1, 1980—181 days prior to the date when political parties are required to certify their nominees for Presidential electors to the Secretary of State and 217 days before the November 4,

[1] Plaintiff Stephen P. Kelley, a registered Maine voter, seeks certification as a candidate to appear on the November 1980 ballot as a Presidential elector for Anderson. Plaintiff James D. Harrington, a registered Maine voter, desires to cast his vote in the November 1980 election for the electors pledged to Anderson. Plaintiff Gerald M. Eisenstat, a registered New Jersey voter, intends to cast his vote in the November 1980 general election for the electors pledged to Anderson in New Jersey.

1980 general election.[2] The statutory filing deadline prevents the placement of Anderson's name on the November ballot as an independent candidate for President. Anderson and his supporters charge that, as a result, the filing deadline impermissibly burdens their constitutional rights to associate for the advancement and expression of political beliefs and effectively to exercise their franchise for the Presidential candidate of their choice, as guaranteed by the First and Fourteenth Amendments, and invidiously discriminates against plaintiffs and others similarly situated, denying them the equal protection of the laws secured by the Fourteenth Amendment.[3] Plaintiffs seek a declaratory judgment that 21 Me. Rev. Stat. Ann. § 494(9) is unconstitutional, null and void as applied to independent candidates for President, or alternatively as applied to the independent candidacy of Congressman Anderson. Plaintiffs also seek a permanent injunction enjoining the defendant Secretary of State of Maine[4] from enforcing the filing deadline against Anderson, and a reasonable attorney's fee pursuant to 42 U.S.C. § 1988. Jurisdiction is properly asserted under 28 U.S.C §§ 1331, 1343(3) and 2201, and 42 U.S.C. § 1983.

The matter is before the Court on plaintiffs' motion for summary judgment and a stipulation of facts. The

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[2] Anderson and his supporters have successfully challenged the constitutionality of state statutory filing deadlines in at least three other federal courts. *See* Anderson v. Hooper, No. 80-432-M Civil (D. N.M. July 8, 1980) (preliminary injunction); Anderson v. Celebrezze, No. C-2-80-400 (S.D. Ohio July 21, 1980) (final judgment); Anderson v. Morris, Civ. No. Y-80-1632 (D. Md. August 6, 1980) (final judgment).

[3] Plaintiffs also contend that the early filing deadline violates the Supremacy Clause, U.S. Const. art. VI, and should be struck down as the result of a "malfunction of the legislative process." The Court finds it unnecessary to reach these additional arguments.

[4] Defendant Rodney S. Quinn, Secretary of State of the State of Maine, is charged with administering the relevant sections of the Maine election law.

legal issues have been comprehensively briefed and argued.

For the reasons to be stated, plaintiffs' motion for summary judgment is granted.

I

The significant facts may be briefly summarized. Until April 24, 1980 Congressman Anderson was an active candidate for nomination by the Republican party for President of the United States. On April 24, 1980, he announced his independent candidacy for President. Subsequent to that date his supporters gathered the number of signatures of registered Maine voters required by Maine law for nominating petitions to place Anderson's name on the general election ballot in November and submitted them to municipal registrars for certification by 5:00 p.m., June 5, 1980, as required by 21 Me. Rev. Stat. Ann. § 494(8). On June 9, the first working day after the last of the certified petitions were received from the municipal registrars, the nominating petitions, containing approximately 6,000 certified signatures, were tendered to the office of the Secretary of State, together with the consent forms required by 21 Me. Rev. Stat. Ann. § 495. The officials rejected the petitions and consent forms on the sole ground that they were not timely filed under 21 Me. Rev. Stat. Ann. § 494(9). Pursuant to an agreement between the parties, while rejecting the petitions as untimely, the state officials accepted custody of them and have processed them in accordance with the usual procedures. The Secretary of State has determined that, apart from their noncompliance with the April 1 filing deadline, the nominating petitions and consent forms comply with the requirements of Maine law and contain a sufficient number of signatures to qualify Anderson for placement on the general election ballot in November. The parties agree that Anderson would have been certified as an independent candidate for President

and placed on the general election ballot, but for the April 1 filing deadline prescribed by 21 Me. Rev. Stat. Ann. § 494(9).

II

The Supreme Court has firmly established that "[r]estrictions on access to the ballot burden two distinct and fundamental rights, 'the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively.'" *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 184 (1979) (quoting *Williams* v. *Rhodes*, 393 U.S. 23, 30 (1968)). The Court has also repeatedly held that substantial burdens on these rights are invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless essential to serve a compelling state interest. *Illinois State Board of Elections* v. *Socialist Workers Party, supra; American Party of Texas* v. *White*, 415 U.S. 767, 780-81 (1974); *Storer* v. *Brown*, 415 U.S. 724, 729 (1974); *Williams* v. *Rhodes, supra* at 31. And, in its most recent ballot access decision, the Supreme Court emphasized that "'even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty,' *Kusper* v. *Pontikes*, 414 U.S. 51, 58-59 (1973), and we have required that States adopt the least drastic means to achieve their ends." *Illinois State Board of Elections* v. *Socialist Workers Party, supra* at 185.

The restriction on an independent Presidential candidate's access to the ballot imposed by Maine's April 1 filing deadline substantially burdens the associational and franchise rights of independent candidates and their supporters, and also effects an invidious discrimination. An independent candidate must decide to run as an independent, gather sufficient certified signatures, and file with the Secretary of State by April 1. In practice, the deadline bars an otherwise viable independent candidate from the

Maine general election ballot solely because he decides to run after April 1. Maine imposes no similar burden on party candidates for the Presidency. Maine does not require party candidates for President to qualify or declare their candidacies by any particular date, and permits the names of party Presidential electors to be certified to the Secretary of State as late as September 30.[5] Clearly, then, Maine's April 1 filing deadline as applied to independent candidates for the Presidency places a substantial and unequal burden on them.

Only a compelling state interest can justify the substantial and unequal burden imposed by Maine's April 1 filing deadline upon independent candidates for President.[6] Yet the State has failed to show any compelling

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[5] The Maine election laws require that the names of Presidential electors nominated by a political party be certified to the Secretary of State within 60 days after the state convention, 21 Me. Rev. Stat. Ann. § 402(2), which must be held between March 1 and August 1 of the election year. *Id.* § 401. Political parties are not required to certify their Presidential and Vice Presidential candidates to the Secretary of State by any particular date.

[6] The State argues that the traditional "compelling state interest" analysis in ballot access cases has been superseded by the "reasonably diligent candidate" standard set forth by the Supreme Court in Storer v. Brown, *supra*, and Mandel v. Bradley, 432 U.S. 173 (1977) (per curiam). In *Storer* and *Mandel*, plaintiffs had tried and failed to obtain the required number of signatures on nominating petitions by the filing deadline. The Supreme Court remanded both cases for further factual development in the lower courts, with instructions to determine whether, in the context of the particular State's politics, "a reasonably diligent independent candidate" could be expected to satisfy the ballot access requirement. Storer v. Brown, *supra* at 742; Mandel v. Bradley, *supra* at 177-78. The standard enunciated in *Storer* and *Mandel* plainly has no application to this case. What the lower courts were called upon to determine in those cases was whether the State's method for assuring that a candidate had a "significant modicum of support," Jenness v. Fortson, 404 U.S. 431, 442 (1971), was unduly burdensome. In the present case, there is no dispute that Congressman Anderson has sufficient community support to merit placement on the ballot. Nor do plaintiffs claim that the nominating procedures themselves

interest, or even a rational justification, for the April 1 filing deadline. The State does not contend that Congressman Anderson has failed to satisfy the State's interest in keeping a frivolous candidate off the ballot by assuring that he is a serious candidate with a significant level of support, the state interest the Supreme Court has most frequently recognized as justifying ballot access restrictions. *See, e.g., Illinois State Board of Elections* v. *Socialist Workers Party, supra* at 184-85; *American Party of Texas* v. *White, supra* at 782 n.14; *Lubin* v. *Panish*, 415 U.S. 709, 715 (1974); *Jenness* v. *Fortson, supra* note 6, at 442. Nor does the State assert that an April 1 filing deadline is required to provide adequate time to verify petitions and print ballots, another state interest which has been recognized by the courts. *See, e.g., Salera* v. *Tucker*, 399 F. Supp. 1258, 1267 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976). Rather, Maine maintains that two other state interests are served by the restrictions imposed by the April 1 filing deadline.

First, the State claims that the filing deadline advances "the State's interest in treating all candidates within the State's practical power to regulate equally." The State's assertion is that it cannot regulate the manner in which party Presidential candidates are selected because of the Supreme Court's decision in *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), and that therefore the filing deadline can be justified because it treats equally all candidates within the State's power to regulate. This argument borders on the frivolous. Plainly, the burdens imposed on independ-

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are unduly burdensome. The only issue is whether the State can require an independent candidate for President to begin to pursue his candidacy in Maine before April 1 and require no equivalent effort by the nominees for President of political parties. Moreover, any doubt as to the continued viability of the "compelling state interest" test where petition filing requirements are challenged has been dispelled by the Supreme Court's most recent ballot access decision, Illinois State Board of Elections v. Socialist Workers Party, *supra* at 184.

ent Presidential candidates must be compared with those imposed on other candidates for the same office, not with candidates for other offices who are elected through an entirely different process.[7]

The second interest asserted by the State is "the State's . . . interest [in] the protection of the integrity of the independent route to the ballot." The State's position is that it has a valid interest in assuring that independent candidates are indeed independent, and therefore in preventing an unsuccessful party candidate from pursuing a second route to the general election ballot. *See Storer* v. *Brown*, *supra* at 733. In effect, the State argues that the April 1 filing deadline acts as a disaffiliation requirement to prevent persons who, having failed to obtain a party nomination, then seek to run as independents. *See id.* at 733-36. *See also Kusper* v. *Pontikes*, *supra* at 59-61; *Rosario* v. *Rockefeller*, 410 U.S. 752, 760-62 (1973). The short answer to this contention is that the filing deadline plainly was not intended to serve as a disaffiliation requirement,[8] and it does not serve that purpose

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[7] Party candidates for statewide elective offices in Maine secure a place on the general election ballot by winning a party primary. To qualify for the primary, they must file nominating petitions by April 1. By a 1979 amendment to the Maine election laws, ch. 359, 1979 Maine Acts 443, the Maine legislature required independent candidates to file by the same date "to Make Equal Application of Legal Requirements for Independents, Democrats and Republicans in all Respects." *Id.* The effect was to establish the same filing date for nominating petitions both for candidates in the primaries, *see* 21 Me. Rev. Stat. Ann. §§ 444 & 445(8) and for independent candidates. *Id.* § 494(9). There is no primary election in Maine for candidates for President, Vice President or Presidential elector.

[8] Indeed, the record suggests that the Maine legislature did not intend to impose any disaffiliation requirement on independent candidates for President and Vice President. The sole reason for imposing the disaffiliation requirement on independent candidates mentioned in the legislative history was to create a restriction equivalent to that imposed on candidates in party primaries, who

in practice. The legislative purpose of Section 494(9), as conceded by the State, was to establish a filing deadline for independent candidates identical to that for party candidates running in primaries. Legis. Doc. 1136, 109th Legis., 1st Sess. (1979) (Statement of Fact). Concerns over the disaffiliation of independent candidates were addressed by the Legislature in entirely different statutory provisions, 21 Me. Rev. Stat. Ann. §§ 135(2) & 493; they had nothing to do with the imposition of the deadline. Although enacted by the same Act, ch.359, 1979 Me. Acts 443, there is no indication in the legislative history that Section 494(9) and the disaffiliation provisions were not separate measures with distinct purposes. *See* Legis. Doc. 1136, *supra;* 1979 Me. Legis. Rec. 1024, 1111. Moreover, the deadline is wholly ineffective as a disaffiliation provision. On its face, it does not prohibit candidates affiliated with a political party, like Anderson, from running as independents as long as they meet the deadline. And it does prohibit genuinely unaffiliated candidates from running as independents if they fail to meet the deadline.

Since the April 1 filing deadline imposed upon independent candidates for President effects substantial and unequal burdens on plaintiffs' rights of association and franchise and is not justified by any compelling state interest, the Court holds 21 Me. Rev. Stat. Ann. § 494(9) unconstitutional as applied to the independent candidacy of Congressman John B. Anderson for President of the United States.

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are required by 21 Me. Rev. Stat. Ann. § 134(3) to be affiliated with the party in whose primary they are running. *See* 1979 Me. Legis. Rec. 1024 (Remarks of Rep. Tarbell). There is no equivalent requirement imposed on party candidates for the Presidency and Vice Presidency. Furthermore, the Maine Attorney General's office has determined that 21 Me. Rev. Stat. Ann. § 493, the disaffiliation statute for independents, does not apply to candidates for President and Vice President, although the reasons for that interpretation do not appear in the record.

III

In accordance with the foregoing, plaintiffs' motion for summary judgment is granted, and judgment will be entered:

(1) Declaring the deadline for filing nomination petitions and consent forms on behalf of independent candidates prescribed in 21 Me. Rev. Stat. Ann. § 494(9) is unconstitutional, null and void as applied to the independent candidacy of plaintiff John B. Anderson for President of the United States; and

(2) Permanently enjoining defendant Rodney S. Quinn, his agents, servants, employees, subordinates, and all other persons acting in concert with him, from enforcing or applying the filing deadline set forth in 21 Me. Rev. Stat. Ann. § 494(9) as a ground for failing or refusing to certify the names of plaintiff Anderson and his running mate for Vice President for inclusion on the official Maine general election ballot as independent candidates for President and Vice President in the general election to be held on November 4, 1980.

IT IS SO ORDERED.

Dated at Portland, Maine, this 11th day of August 1980.

/s/ Edward J. Gignoux
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-1534

JOHN B. ANDERSON; D. A. BERT BOOTH;
KEVIN P. MCCLEAF; GERALD M. EISENSTAT,
Appellees,

v.

WILLARD A. MORRIS, in his official capacity as State Administrator of the Election Laws, State Administrative Board of Election Laws; THEODORE N. CLARK, in his official capacity as Chairman of the State Administrative Board of Election Laws; JAMES W. JOHNSON, in his official capacity as Vice-Chairman of the State Administrative Board of Election Laws; REGINALD A. ASPEN, in his official capacity as a member of the State Administrative Board of Election Laws; KAREN LANCASTER, in her official capacity as a member of the State Administrative Board of Election Laws; SYLVIA RAPHAEL, in her official capacity as a member of the State Administrative Board of Election Laws; STATE ADMINISTRATIVE BOARD OF ELECTION LAWS,
Appellants.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Joseph H. Young, District Judge

Argued September 8, 1980 Decided September 17, 1980

Before HAYNSWORTH, Chief Judge, WINTER and PHILLIPS, Circuit Judges.

PER CURIAM:

At the instance of presidential candidate John B. Anderson and various of his supporters, the district court ruled that Maryland's filing deadline for candidates for the presidency of the United States who seek nomination by petition was unconstitutional. Accordingly, it ordered Maryland election officials to place Mr. Anderson's name on the general election ballot as an independent candidate if, on or before August 4, 1980, the petition for his nomination otherwise complied with the requirements of Maryland law. Anderson v. Morris, —— F. Supp. —— (D. Md. 1980). The state election officials have appealed, and we affirm.

We find ourselves essentially in agreement with the opinion of the district court both as to the facts and the applicable law.[1] While we are content to affirm primarily on the opinion of the district court, we append the following comments in summary of our own views:

In Maryland a candidate for the presidency who is not the candidate of a major political party may obtain access to the general election ballot by petition. Ann. Code of Md. Art. 33, § 7-1(a).[2] A candidate seeking nomination by petition must file a certificate of candidacy at the time and place and in the manner provided in Subtitle 4A of Article 33 and comply with other applicable provisions of law. Section 4A-3 requires the certificate of candidacy to be filed on the Monday which is ten weeks or seventy days before the day on which the primary election shall

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[1] The facts were stipulated and the case was submitted on cross motions for summary judgment.

[2] This and all subsequent statutory references are to Ann. Code of Md., Art. 33 (1976 Ed. and 1979 Cum. Supp.).

be held.[3] In a presidential election year the primary is held on the second Tuesday in May; thus for 1980, certificates of candidacy for nomination by petition were required to be filed by March 3, 1980.

A major party candidate for the presidency need never make any application or file any declaration of candidacy for either the primary or general election ballot. His name may appear on the primary ballot at the instance of the Maryland Secretary of State or by filing a petition containing the signatures of registered voters. § 12-2.[4] Even if the candidate does not participate in the primary or, if he does participate in the primary and is defeated, he may appear on the ballot for the general election if his nomination is certified by the persons whose duty it may be "by party usage" to declare the result of an election by convention, §§ 8-1(a); 5-1, and that certification need not be made until sixty-five days before the general election, § 8-4. In other words, a major party presidential candidate who does not choose to campaign in the Maryland primary or loses the primary may still appear on the Maryland ballot in November if he is nominated by the party convention.

It is manifest that Maryland imposes harsher restrictions on an independent candidate for the presidency than on the candidate of a major party, and, in particular,

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[3] By the provisions of § 7-1 the certificate of candidacy must be accompanied by at least one-third of the requisite signatures of eligible registered voters who support the petition. The remaining signatures may be filed at a later date. In the instant case Mr. Anderson failed to comply with the filing date for the certificate of candidacy and the initial requisite signatures. He did, however, supply the remaining signatures within the time fixed by law. The validity of the signatures requirement is not at issue here.

[4] This petition is different from the petition procedure authorized by § 7-1. Under § 12-2, a person seeking to be the nominee of a party which uses a presidential primary may obtain access to the *primary* ballot. Under § 7-1 a person may obtain access to the *general* election ballot. *See* n.9, *infra*.

that an independent candidate for the presidency must formally declare his candidacy at an earlier date than one who subsequently appears on the general election ballot as the candidate of a major party.[5] In determining the validity of such a restriction, we perceive that we must consider two factors: first, is the restriction necessary to serve a substantial state interest, and, second, if so, is it unduly burdensome on the right of an independent candidate to gain access to the ballot. Elections Board v. Socialist Workers Party, 440 U.S. 173 (1979); Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1970); Williams v. Rhodes, 393 U.S. 23 (1968). We think that, with respect to presidential candidates, Maryland's early filing date in issue fails the first test.

Before us, Maryland vigorously argues that the early filing date furthers stability in the political process.[6] We do not doubt the legitimacy of the asserted interest. A state may properly conclude that intraparty disputes should be settled in party primaries, that the general election ballot is reserved for major political struggles, that it should not be the forum for continuing intraparty feuds and that losers in primaries should not be per-

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[5] Maryland argues that as a practical matter major party candidates for nomination must declare themselves at least a year preceding the year of the general election. We reject the argument because we are concerned with the date of formally rgistering a candidacy under Maryland law rather than the date of personal or political commitment to become a candidate. Similarly, we do not think it determinative that Mr. Edward Clark, the Libertarian Party candidate for president, has been successful in obtaining a place on Maryland's general election ballot by the route sought to be followed by Mr. Anderson. What we are concerned with in the instant case is what Maryland requires to be done, not what it was possible for another candidate to do.

[6] The opinion of the district court discloses that Maryland advanced other arguments before it to justify the early filing date. They were not pressed before us and we do not comment on them beyond the disposition made of them in the district court's opinion.

mitted to continue the struggle, all to the end that the general election ballot shall present the electorate with understandable choices and the winner shall have sufficient support to govern effectively. *See, e.g.*, Storer v. Brown, 415 U.S. at 735; Williams v. Rhodes, 393 U.S. at 31-33. We cannot conclude, however, that the early filing date under attack achieves or helps to achieve these objectives.

Maryland has a "sore loser" statute, § 8-2, which prohibits a person defeated in a party primary for the nomination for an office, other than judge, from appearing on the general election ballot. But § 8-2, by its terms, contains certain exceptions for presidential candidates. In the instant case, Maryland concedes that it has no application in this case, that is, that Mr. Anderson is not barred by § 8-2 from appearing on the general election ballot notwithstanding that he was technically a defeated candidate in the Maryland Republican presidential primary.[7] If it were possible for a state to adopt a sore loser law applicable in all circumstances to presidential races, this would be a means of serving the interests that Maryland asserts.[8]

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[7] Pursuant to § 12-2, the Maryland Secretary of State placed Mr. Anderson's name on the Republican Party primary ballot. While Mr. Anderson could have withdrawn up to March 21, he did not do so. His announcement that he would pursue his candidacy as an independent was not made until April 24, 1980. Thereafter, he discontinued his campaign for the nomination of the Republican Party. Mr. Anderson's name remained on the Maryland primary ballot and he lost the election.

[8] Of course, it is improbable that such a statute could be adopted by reason of the very nature of the American political process for the selection by the major parties of their presidential candidates. Because candidates are selected by convention and the convention occurs after all state primary elections have been concluded, a state must make provision for a candidate nominated by national convention to appear on its general election ballot even if the candidate did not appear on the primary ballot in that state, or, having appeared, was defeated in the state primary. We do not express any view

But we cannot conclude that Maryland's early filing date is in the nature of a sore loser statute or that it furthers the asserted state interests in any respect. This conclusion follows from the fact that Maryland does not prohibit a presidential candidate from both participating in his party's primary and seeking nomination by petition simultaneously for the same general election.[9] Thus,

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on the constitutionality of a presidential sore loser statute containing such exceptions.

[9] Maryland argues that it is "absolutely false" that a candidate may seek nomination as a candidate of a major party in the presidential primary and also seek access to the general election ballot as an independent. As we read the Maryland statutes, they do not support this argument.

Under § 12-2(a)(1), the name of a candidate who seeks the nomination of a major party is placed on the primary ballot by the Secretary of State "when he has determined . . . that the candidate's candidacy is generally advocated or recognized in the news media throughout the United States or in Maryland . . .," subject to withdrawal by the candidate. Even if the Secretary of State might properly conclude not to direct inclusion of the name as a candidate on the ballot, because the Secretary has knowledge that the candidate is also seeking access to the general election ballot by petition under § 7-1(a), the candidate who seeks the nomination of a major party may also gain access to the primary ballot by petition under § 12-2(a)(2). Under that statute, he need only pay the prescribed fee and file the required petition, supported by only four hundred of the registered voters within each congressional district, not later than fifty-three days before the primary election.

The eligibility requirements of a candidate to seek nomination by petition under § 7-1 are stated in the disjunctive. The pertinent one is "[a] candidate for any public office . . . who is a member of or affiliated with a partisan organization which is not a political party . . . ." The term "partisan organization" is defined by § 1-1 (12) to mean "any combination of two or more persons formed for the purpose of assisting the promotion of the success or defeat of any candidate, political party, principle or proposition to be submitted to a vote at any election." Thus, it is entirely possible for a person to be a member of a political party and to be a member of or affiliated with a partisan organization simultaneously. A hypothetical example would be a person who was registered as a member of a major political party and who, desiring to be elected

there is no relationship whatsoever between (1) a presidential candidate's deciding by March 3 to seek nomination as an independent, and (2) entering, winning or losing Maryland's primary.[10]

Failing to achieve a legitimate purpose, Maryland's early filing date for presidential candidates for nomination by petition is invalid. The mandate shall issue forthwith.

AFFIRMED.

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president, also affiliated himself with or joined a group formed for the sole purpose of advancing his candidacy.

There is nothing that we perceive or to which Maryland points to prevent a voter or a candidate from being a member of a major party and a member of or affiliated with a partisan organization simultaneously: hence our conclusion that under the Maryland statutes a candidate may obtain access to his party's ballot for the presidential primary and simultaneously obtain access to the presidential general election ballot.

[10] Maryland argues that a candidate could not seek both routes to the ballot as a practical political matter. Assessing the "political realities" of a statutory scheme is an appropriate inquiry in evaluating the *burden* of the scheme, but it plays no part in determining whether the statute serves a substantial state interest.

Joint Appendix

JUL 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1635

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN B. ANDERSON, GEORGE H. HETRICK, LESLIE LAUFMAN, M.D., GERALD M. EISENSTAT,
Petitioners,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of the State of Ohio,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MARCH 4, 1982
CERTIORARI GRANTED MAY 3, 1982

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UNITED STATES DISTRICT COURT
FOR SOUTHERN DISTRICT OF OHIO
(EASTERN DIVISION)

C-2-80-400

JOHN B. ANDERSON, *et al.*

vs.

ANTHONY J. CELEBREZZE, JR.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
5/19/80	1	COMPLAINT.
		* * *
5/29/80	5	ANSWER OF Deft.
6/9/80	6	JOINT STIPULATION OF FACTS.
6/16/80	7	PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.
6/16/80	8	MEMO IN SUPPORT OF (7).
6/16/80	9	DEFT CELEBREZZE'S MOTION FOR SUMMARY JUDGMENT.
6/16/80	10	MOTION FOR ACLU of OHIO TO APPEAR AS AMICI CURIAE. (Memo of law attached)
6/20/80	11	MOTION FOR PRELIMINARY INJUNCTION
6/20/80	12	PLTF REPLY BRIEF
6/20/80	13	DEFT CELEBREZZE'S MEMO IN OPP TO PLTF MOTION FOR SJ
6/24/80	14	ORDER. Both arguments for summary judgment motions and the motion for preliminary injunction are consolidated for hearing on June 26, 1980. (cmtc)
6/25/80	15	ORDER. (10 granted. Memo of law is to be filed by the court. (cmtc)

DATE	NR.	PROCEEDINGS
6/25/80	16	MEMO OF LAW
6/26/80	17	DEFT MEMO IN OPP. TO (11)
6/26/80		Hearing before the Hon. Robert M. Duncan.
6/26/80	18	MEMO OF LAW SUBMITTED BY ACLU
7/3/80	19	TRANS of 6-26-80. 1 vol.
7/17/80	20	OPINION. (9) Denied. (11) Denied. (7) Granted. It is adjudged and decreed that R.C. 3513.257 as applied to plaintiff Anderson and Hetrick is violative of pltfs rights to political association under the First and Fourteenth amendment to the U.S. Constitution and is violative of plaintiffs'; rights to equal protection under the fourteenth amendment to the U.S. Constitution. Judgment is entered for the plaintiffs. It is hereby ordered that the defendant Secretary of State accept and process the plaintiffs' petition and other documents as timely filed under R.C. 3513.257. It is ordered that deft cause anderson's name to appear on the Ohio Ballot in the November 4, 1980 election, if aside from R.C. 3513.257, he has otherwise met the requirements of Ohio's Election laws. cmtc.
7/18/80	21	JUDGMENT AS TO (20). cmtc.
7/28/80	22	Notice of Appeal by Defendants CMTC
		Record Certified to 6th Circuit
8/15/80	23	Cert. Ret. for 6th Cir. 80-3513
3/6/82	24	JUDGMENT of USCA [received] . . . the judgment of the district court is REVERSED, each party to bear its own costs on appeal, cmtc
5/11/82	25	SUPREME COURT ORDER [received] . . . the petition for writ of certiorari is GRANTED. cmtc

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case No. 80-3513

GENERAL DOCKET

DATE		FILINGS—PROCEEDINGS
1980		
7/29	1)	Copy of Notice of Appeal
7/30		*Certified Record* (2 vol of pleadings and 1 vol of transcript), filed; and cause docketed
7/31	2)	Motion of appellees to suspend rules and to expedite proceedings (p-7/31)
8/4	3)	Appellant's response in opposition to motion to expedite proceedings (p-8/1)
8/8	4)	Telegram from appellant re: filing of petition for certiorari and motion to expedite filed in Supreme Court this date; appellee to file response by noon of 8/11/80
8/12	5)	Notice of filing petition for certiorari 8/7/80 (Sup. Ct. No. 80-182)
8/12	6)	Letter from counsel for appellee asking same be construed as response to appellant's opposition for expedited proceedings
8/12	7)	Order denying motion to suspend the rules and expedite the appeal without prejudice (Lively, Brown and Jones, JJ.)
8/21	8)	Copy of letter from Clerk of Supreme Court advising counsel that an order was entered on 8/15/80, denying, without prejudice, motion to expedite consideration of petition for writ of certiorari
8/29	9)	Motion: Appellant's brief to 30 days after ruling on writ of certiorari in Supreme Court (m-8/28) [Motion Granted, Lively, J. 9/5/80]

DATE		FILINGS—PROCEEDINGS
1980		
9/23	10)	Certified copy of order of Supreme Court denying certiorari 9/18/80
9/23	11)	Copy of letter from Clerk of Supreme Court advising counsel that renewed motion of petitioner to expedite consideration of the petition for writ of certiorari was granted. The petition for writ of certiorari was denied.
10/8	12)	Motion: appellant's brief to 11/18/80 [m-10/7/80] [Motion Granted JPH/lg 10/15/80]
11/14		Brief (25) of appellant (m-11/13)
11/14		Appendix (10) (m-11/14)
12/18		Brief (25) of appellees (m-12/16)
12/18		Supplement to appellee's brief containing citations (m-12/16)
1981		
1/5		Reply brief (25) (m-12/31)
		* * *
6/16		Cause argued by Taylor for appellant, by Jackson for appellee and case submitted to the Court (Before: Engel, Kennedy and Martin, JJ.)
11/4	15)	Judgment of the District Court is reversed, each party to bear its own costs (Engel, Kennedy and Martin, JJ.)
11/4	16)	Opinion by Kennedy, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C-2-80-400

JOHN B. ANDERSON,
2711 Highcrest Road
Rockford, Illinois 61107

GEORGE H. HETRICK,
8161 Manitou Drive
Westerville, Ohio 43085

LESLIE LAUFMAN, M.D.,
367 E. Northwood Avenue
Columbus, Ohio 43201

—and—

GERALD M. EISENSTAT,
1213 McClain Drive
Vineland, New Jersey 08360
Plaintiffs,

v.

ANTHONY J. CELEBREZZE, JR.,
in his official capacity as Secretary of
State of the State of Ohio,
30 E. Broad Street
Columbus, Ohio 43215,
Defendant.

[Filed May 19, 1980]

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This action is brought to challenge the constitutionality of Section 3513.257 of Title 35 of the Ohio Revised Code (the "Code"). That provision, which requires an independent candidate for the Presidency of the United States to file a petition for nomination no later than March 20, 1980—a date 229 days before the general election and earlier than that required in all but two other states—operates to deny Representative John B. Anderson the right to have his name appear on the Ohio ballot as an independent Presidential candidate in the 1980 general election, in violation of his federal constitutional rights and those of electors pledged to his support. The unreasonably early filing deadline of Section 3513.257 also operates to deny all eligible voters of the State of Ohio who support Representative Anderson for the Presidency the right to effectively exercise their franchise in favor of plaintiff Anderson as the candidate of their choice for President of the United States in the November general election, again in violation of their federal constitutional rights. It further operates to deny eligible voters in other states in which plaintiff Anderson will be on the ballot in the November 1980 general election the right to effectively exercise their franchise in seeking to elect Anderson President of the United States. The State of Ohio cannot point to any compelling countervailing State interest that would justify the foregoing infringements of the plaintiffs' federal constitutional rights. Accordingly, plaintiffs seek declaratory and injunctive relief against application or enforcement of the filing deadline set forth in Section 3513.257 as a ground for failing or refusing to certify the name of Representative Anderson for inclusion on the official Ohio ballot as an independent candidate for President in the general election.

COUNT ONE

Jurisdiction

2. The jurisdiction of this Court is invoked pursuant to Article II, § 1, Article VI, and the First, Fifth and Fourteenth Amendments of the Constitution of the United States; 28 U.S.C. §§ 1331, 1343(3), and 2201-02; and 42 U.S.C. § 1983. The amount in controversy exceeds the sum of $10,000, exclusive of interest and costs.

Venue

3. Venue is properly found in this District and this Division under 28 U.S.C. §§ 1391(b) and 1393(a) in that this Court comprises the District and Division in which the defendant Celebrezze maintains his official residence and in which the claim arose.

Parties

4. Plaintiff John B. Anderson is and for nineteen years has been a member of the United States House of Representatives from the State of Illinois. He is an independent candidate for President of the United States in the 1980 general election. He meets the qualifications prescribed in the Constitution for election to the office that he seeks in that he is a natural-born citizen of the United States, has attained the age of 35 years, and has been 14 years a resident within the United States.

5. Plaintiff Hetrick is a duly registered voter in the State of Ohio who has been designated to seek certification as a candidate for presidential elector pledged to the candidacy of plaintiff Anderson. His name was included on a slate of candidates for presidential electors, pledged to support the independent candidacy of plaintiff Anderson, tendered to defendant Celebrezze on May 16, 1980. Plaintiff Hetrick meets the qualifications prescribed in the Constitution for election to the office that he seeks in that he is not a United States Senator or Representa-

tive and does not hold an office of trust or profit under the United States.

6. Plaintiff Laufman is a duly registered voter in the State of Ohio who wishes to cast her vote in the 1980 general election for the slate of electors pledged to plaintiff Anderson.

7. Plaintiff Eisenstat is a duly registered voter in the State of New Jersey, in which plaintiff Anderson's name has already been certified to appear on the ballot in the 1980 general election as an independent candidate for President of the United States. Plaintiff Eisenstat intends to cast his vote in the 1980 general election for the slate of electors pledged to plaintiff Anderson in New Jersey.

8. Defendant Anthony J. Celebreeze, Jr. is the Secretary of State of the State of Ohio. As such, he is charged by law with responsibility for the administration of the procedures by which, among other things, (i) nominating petitions filed by independent candidates for President and Vice President are received by the State of Ohio and transmitted to the appropriate county boards of election of the State of Ohio for their verification of the signatures contained therein, and (ii) the names of independent candidates who have been duly nominated for the offices of President and Vice President are certified to all county boards of election for inclusion on the official Ohio ballot in the general election.

Facts

9. On April 24, 1980, plaintiff Anderson publicly announced his intention to pursue an independent candidacy for the office of President of the United States. At the same time he publicly announced his previously-declared intention to seek the Republican party's nomination for that office and filed with defendant Celebrezze a notice of withdrawal of consent which resulted in his name being

removed from the ballot of the Ohio Republican party primary scheduled to be held on June 3, 1980.

10. Following plaintiff Anderson's announcement, supporters of his presidential candidacy throughout the United States began arrangements to list him as an independent candidate for President on the ballots of every State of the Union in the forthcoming general election.

11. Following plaintiff Anderson's announcement, a group of his supporters in Ohio began to secure the necessary signatures of registered Ohio voters to nominate plaintiff Anderson as an independent candidate for President and to place his name on the Ohio ballot in the general election. Between May 10 and May 15, 1980, supporters of plaintiff Anderson secured the signatures of more than 14,000 registered voters in Ohio, more than the 5,000 signatures required to nominate him and to secure a ballot position on his behalf under Code Section 3513.257.

12. Under Code Section 3513.257, a candidate seeking to be listed on the general election ballot as an independent candidate for President must file a statement of candidacy and petitions containing the requisite number of signatures no later than 4 p.m. on the seventy-fifth day before the first Tuesday after the first Monday in June immediately preceding the November general election, *i.e.*, March 20, 1980—75 days prior to the June 3 primary and 229 days prior to the general election. Only two States in the Union have filing deadlines earlier than that established by Code Section 3513.257.

13. On May 16, 1980, supporters of plaintiff Anderson presented to officials in the Office of the Secretary of State (i) a Statement of Candidacy by plaintiff Anderson, (ii) Nominating Petitions containing at least the number of signatures of eligible Ohio voters required to place the name of plaintiff Anderson on the Ohio general election ballot, (iii) a full slate of candidates for

presidential electors, including the name of plaintiff Hetrick, pledged to support the candidacy of plaintiff Anderson, and (iv) two filing fees of $50 each. Save for the terms of the unreasonably early filing deadline set forth in Code Section 3513.257, the papers tendered by the supporters of Representative Anderson on behalf of plaintiffs Anderson and Hetrick complied in all respects with applicable provisions of Ohio law.

14. Acting pursuant to defendant Celebrezze's instruction, the State officials to whom the foregoing papers were tendered failed and refused to accept the Statement of Candidacy, Nominating Petitions, slate of candidates for presidential electors, and filing fees, on the sole ground that they were not timely filed under Code Section 3513.257.

15. Plaintiff Anderson is an independent, serious and viable candidate for the office of Presidency of the United States, and has substantial community support for his candidacy. Many citizens throughout the United States and in the State of Ohio wish to vote for plaintiff Anderson as an independent candidate for President. A recent public opinion poll shows that plaintiff Anderson currently is the first choice for President of more than 23% of the voters nationwide and, if voters thought he had a real chance of winning in November, 29% of the voters nationwide would choose to cast their ballots for him. In eight of the largest states (California, New York, Illinois, Pennsylvania, *Ohio*, Michigan, Massachusetts and New Jersey), the same May 14 public opinion poll shows that plaintiff Anderson is the current first choice of 29% of the voters and that if voters thought he had a real chance of winning in November, 36% would vote for his candidacy, as compared with 31% for President Carter and 29% for Governor Reagan.

16. March 20, 1980 filing deadline imposed by Code Section 3513.257 operates to preclude plaintiff Anderson from appearing on the ballot in Ohio in the general elec-

tion, and to preclude plaintiff Hetrick from standing as a candidate for presidential elector pledged to support plaintiff Anderson in that election. The filing deadline also operates to preclude plaintiff Laufman from effectively exercising her franchise in the November 4, 1980 general election in support of plaintiff Anderson for President. In addition, the unreasonably early filing deadline operates to preclude plaintiff Eistentat from effectively exercising his franchise in New Jersey to seek to elect plaintiff Anderson President of the United States in the November 1980 general election by abridging, diluting and debasing the exercise of that franchise.

17. The filing deadline in Code Section 3513.257, which is 75 days before the primary election and 229 days before the general election, is not justified by any compelling State interest.

a. Under Code Section 3513.262, defendant Celebrezze need not transmit the Nominating Petitions to the appropriate county boards of election until June 15, 1980—87 days after the petitions were to have been filed with him on behalf of plaintiff Anderson.

b. Under Code Section 3513.262, the county boards of election to which defendant Celebrezze would transmit the Nominating Petitions would not begin to examine and determine the sufficiency of the signatures thereon until the two-week period extending from June 30 through July 15.

c. Defendant Celebrezze will not know the names of the Republican and Democratic nominees for President and Vice President until the conclusion of the national political conventions of those parties, which are scheduled to be held beginning, respectively, July 14 and August 11, 1980.

d. Under Code Section 3505.01, defendant Celebrezze need not certify the names of presidential and vice-presi-

dential candidates for inclusion on the official Ohio general election ballot until September 5, 1980.

18. The filing deadline prescribed by Code Section 3513.257 is unconstitutional, null and void as applied to independent candidates for President and Vice President, and in particular as applied to the independent candidacies of plaintiffs Anderson and Hetrick, on the ground that the statutory provision violates Article II, § 1, Article VI, and the First, Fifth and Fourteenth Amendments of the United States Constitution in the following respects:

a. It denies and abridges the constitutional rights of plaintiffs Anderson, Hetrick, and Laufman and all registered Ohio voters wishing to vote for plaintiff Anderson freely to associate for the advancement and expression of their political beliefs as represented by Congressman Anderson's independent candicacy for President and to reject the views and policies of the Republican and Democratic parties as represented respectively by their platforms, policies and candidates; their right of political association to seek to elect plaintiff Anderson President of the United States; and their right of free speech to advocate and support the candidacy, policies and programs of plaintiff Anderson.

b. It denies and abridges the constitutional rights of plaintiffs Anderson and Hetrick to seek, respectively, the Presidency and the office of presidential elector.

c. It denies plaintiff Laufman and other eligible Ohio voters who wish to vote for plaintiffs Anderson and Hetrick their right to effectively exercise their franchise for the candidates of their choice for President and presidential elector.

d. It denies and abridges the constitutional rights of plaintiffs Anderson, Hetrick, and Laufman, and all registered Ohio voters who wish to vote for plaintiffs Anderson and Hetrick, to equal protection of the laws in that it

creates an invidious, arbitrary and unjustified discrimination between partisan and independent candidates for President and presidential elector, and between eligible Ohio voters who wish to vote respectively for partisan and independent candidates, with respect to the fundamental constitutional rights described in Paragraph 18 (a)-(c) of this Complaint.

e. It denies and abridges the constitutional rights of plaintiff Eisenstat and of all other registered voters in states such as New Jersey, in which plaintiff Anderson has already been certified to be on the ballot as an independent candidate for President in the November 1980 general election, and in other states in which he will be so certified, to effectively exercise their franchise to seek to elect Anderson President of the United States by abridging, diluting and debasing the exercise of that franchise; and it denies and abridges their rights under the First Amendment to associate and advocate for the advancement of plaintiff Anderson's candidacy and the expression of political beliefs represented thereby.

f. It denies all plaintiffs and others similarly situated the due process of law guaranteed by the Fifth and Fourteenth Amendments, in that Ohio's early filing deadline imposes an arbitrary, capricious, unreasonable and unjustified barrier to the exercise of the fundamental constitutional rights set forth in Paragraph 18(a)-(e) of this Complaint bearing no reasonable relationship to any legitimate goal or interest of the State of Ohio.

g. Finally, the early filing deadline violates the Supremacy Clause of the United States Constitution, Article VI, in that it is inconsistent with and frustrates the operation of federal laws governing the conduct of Presidential elections, including the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431 *et seq.*, and the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9001 *et seq.*; and exceeds the State of Ohio's authority to fix only the "manner" in which its electors are chosen granted by Article II, § 1 of the Constitution.

19. By force of his application of the filing deadline in Code Section 3513.257, defendant Celebrezze, acting under color of State law, has deprived, is depriving, and unless restrained by this Court, threatens to continue to deprive plaintiffs of their federal constitutional rights described in Paragraph 18(a)-(g) of the Complaint, all in violation of 42 U.S.C. § 1983.

20. Plaintiffs have no adequate remedy at law and have exhausted all available administrative remedies. Unless this Court acts to restrain defendant Celebrezze, plaintiffs will suffer irreparable injury.

WHEREFORE, plaintiffs John B. Anderson, George H. Hetrick, Leslie Laufman, and Gerald M. Eisenstat respectfully pray that this Court:

1. Enter a final judgment that:

a. Declares that the deadline for filing Statements of Candidacy, Nominating Petitions, slates of electors, and filing fees on behalf of independent candidates prescribed in Ohio Revised Code Section 3513.257 is unconstitutional, null, and void as applied to independent candidates for President and Vice President, or in the alternative as applied to the independent candidacies of plaintiffs Anderson and Hetrick, insofar as that provision would operate to deny independent candidates, including plaintiffs Anderson and Hetrick, access to the official Ohio general election ballot, and plaintiff Laufman the right to vote for plaintiffs Anderson and Hetrick, as independent candidates for President and presidential elector, in the Ohio general election to be held on November 4, 1980; and

b. Permanently enjoins defendant Celebrezze, his agents, servants, employees, subordinates, and all other persons acting in concert with him, from enforcing or applying the filing deadline set forth in Ohio Revised Code Section 3513.257 as a ground for failing or refusing to certify the names of plaintiff Anderson and his running mate

for Vice President for inclusion on the official Ohio general election ballot as independent candidates for President and Vice President in the general election to be held on November 4, 1980.

2. Award to plaintiffs a reasonable attorneys' fee pursuant to the Civil Rights Attorney's Fees and Awards Act of 1976, 42 U.S.C. § 1988.

3. Grant such other and further relief as the Court may deem necessary or appropriate in the premises.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1970

No. ———

HELEN MARCIA SWEETENHAM, *et al.*,
Appellants,

—VS.—

JAMES A. RHODES,
Governor of the State of Ohio, *et al.*,
Appellees.

JURISDICTIONAL STATEMENT IN SUPPORT OF APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

Opinion in the Court Below

The district court issued an opinion which is not yet reported. It is set forth in the Appendix (p. 10, *et seq.*).

Jurisdiction

Appellants ask that this appeal be granted to review a part of the judgment entered on July 29, 1970 by the three-judge United States District Court convened below pursuant to 28 United States Code, Section 2281. Appellants claim that their rights were violated contrary

to the First and Fourteenth Amendments to the Constitution of the United States.

The jurisdiction of this Court is invoked under 28 United States Code, Sections 1253 and 2101. This Court's jurisdiction is sustained by *Williams v. Rhodes*, 393 U.S. 23 (1968).

The Statutes Involved

OHIO REVISED CODE

Section 3513.257 (in pertinent part):

> The nominating petition of an independent candidate for the office of representative to the general assembly, senator of the general assembly, and district representative to congress, shall be signed by not less than four per cent of the number of electors who voted for governor, or for presidential electors, at the next preceding regular state election for the office of governor in the district. * * *
>
> * * * *
>
> * * * Such petition shall be filed with the board of elections of that county or part of a county within the district which had a population greater than that of any other county or part of a county within the district according to the last federal decennial census, not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

Section 3513.258 (in pertinent part):

> The nominating petition of an independent candidate for the office of governor, lieutenant governor, secretary of state, auditor of state, treasurer of state, attorney general, judge of the supreme court, president and vice-president of the United States, United States senator and representative at large to congress, shall be signed by not less than four per

cent of the number of electors who voted for governor, or for presidential electors, at the next preceding regular state election; provided that no such nominating petition shall be accepted for filing or filed if it appears on its face to contain signatures aggregating in number more than twice the minimum aggregate number of signatures required by this section. * * *

* * * *

Such petition shall be filed with the secretary of state not later than four p.m. of the ninetieth day before the first Tuesday after the first Monday in May immediately preceding such general election.

* * * *

Questions Presented by the Appeal

1. Where a state has previously required that independent candidates file their nominating petitions sixty days before the general election, may it now require them to file nine months before the general election without showing any necessity for the change?

2. Where a state has prescribed that independent candidates for political office must file their nominating petitions approximately nine months before the general election and where such requirement is not shown to be justified by any compelling state need, are the First and Fourteenth Amendments contravened?

Statement of the Case

This case arrives at this Court as a continuation of a several pronged effort undertaken in January, 1968 to reopen Ohio's election process to minority parties and independent candidates. (*Socialist Labor Party v. Rhodes*, 290 F.Supp. 985 (S.D. Ohio 1968), affirmed *sub nom. Williams v. Rhodes*, 393 U.S. 23 (1968) and *Brockington v. Rhodes*, 396 U.S. 41 (1969).) The need for this effort

has been aptly described by Judge Kinneary of the Southern District of Ohio:

> During the fifteen year period prior to 1947, participation in the electoral process by independently nominated candidates was neither substantial nor disruptive. Nevertheless in that year the Ohio General Assembly began a series of changes in the election laws which ultimately resulted in the complete elimination of independent and third party voters and candidates from Ohio's political arena. *Socialist Labor Party v. Rhodes*, 290 F. Supp. 985 at 994.

The situation in 1968 could be illustrated metaphorically by likening Ohio's election laws to a jungle which was so overgrown that it choked out and prevented any new growth. Part of this noxious growth was removed by *Socialist Labor Party v. Rhodes*, *supra*, where the right to write-in votes was returned to Ohio electors. When that case was affirmed in part by this Court, *sub nom.*, *Williams v. Rhodes*, *supra*, the right to run for president as an independent candidate was also restored and an incredibly burdensome 15% signature requirement for new political parties was overturned.

Shortly thereafter, this Court noted probable jurisdiction in *Brockington v. Rhodes*, *supra*, which attacked the signature gathering requirement imposed on independent candidates in Ohio. Before that case could be heard, Ohio's legislature grudgingly acknowledged the imperative placed upon it by the decisions in the *Socialist Labor Party* and *Williams* cases and thereafter reduced signature gathering for political parties to 7% and for independent candidates to 4%. (A few months later, *Brockington*, *supra*, was held moot by this Court primarily for reasons of Ohio procedure.)

These events cleared only a part of the forest. The new percentages were a change in name only so far as independents and third parties were concerned. In terms

of their ability to comply—there was no change. In addition, all independent candidates had to file their petitions in February—nine months before the election. And independent candidates for state office still had to gather a minimum number of signatures in many counties despite the fact that most of Ohio's population is concentrated in only a few of its 88 counties. New political parties still faced incredibly complex requirements as to internal organization (see footnote 1 to *Williams v. Rhodes*, 393 U.S. at 25) and an offensive loyalty oath requirement.

This case and a companion case for the Socialist Labor Party were filed in an attempt to complete the task of democratizing Ohio's electoral system. Significant success was attained below. In the *Socialist Labor Party* case which involved a constitutional challenge to some nine statutes, only the loyalty oath survived. In the subject case, of three statutes complained of, only the requirement that independent candidates file their nominating petitions nine months before the general election was allowed to stand.

This appeal, therefore, deals with the requirement of when the nominating petitions of independent candidates must be filed. It arises on these uncontested facts:

Appellant Sweetenham is an independent candidate for Governor of Ohio and appellant Stapleton is an independent candidate for Congressman from Ohio's Twenty-second District. They intend to be candidates in future elections as well. They asked below for declaratory and injunctive relief. The district court declined to grant affirmative relief, holding that the early filing requirement was valid.

Under the 4% statute, appellant Sweetenham faced the task of securing the staggering total of 158,388 valid signatures. Appellant Stapleton needed 5,572 valid signatures. By August 4, 1970 Sweetenham had accumu-

lated 1,614 signatures and had tendered them to the Secretary of State, who refused to accept them. By August 3, 1970 Stapleton had 2,455 signatures and his tender on that date to the Cuyahoga County Board of Elections was likewise refused. These tenders were made more than ninety days before the General Election and under former statutes were timely.

Substantiality of Questions Involved

Cases dealing with suffrage carry special freight. The right to vote is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). The assertion in our Declaration of Independence that governments derive "their just powers from the consent of the governed" leads reluctantly to the principle that:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

It seems, therefore, that where government is representative in nature, where the representatives are chosen only at fixed periods, and where the representatives are empowered to act on crucial matters, elections must be conducted so that citizens have the freest possible choice consonant with the logistics of the election process. Courts should be diligent to guard this opportunity because there are many things that elected majorities can do to prevent election competition and to preserve their place in office.

The requirement attacked here is an example. Ohio has required that independent petitions be filed ninety days before the party primary elections in May. It is not coincidence that this date also is the deadline for filing of papers for candiates in the party primaries. Thus, these statutes enforce party discipline through *state law*. The aim is to prevent someone from running in the party primary, losing, and later filing as an independent.

Because of the early date set for the primary in Ohio, the system runs roughshod over the rights of independent candidates. Astoundingly, the court below found the statutory preference accorded political parties over independents to be constitutionally legitimate, stating:

> One may not play dog in a political manger by withholding his determination of candidacy until after party candidates are chosen by the primary process.

The implicit assumption in this is that only opportunistic and disgruntled party members use the independent candidate process. This ignores the reality that there are many, perhaps millions, of people in the United States who are true independents with no allegiance to any political party.

> Although a large majority of our people hold allegiance to the two major political parties in this nation and believe that free government is most efficiently perpetuated through a two-party system, nevertheless there are millions of independent voters who should always be given an equal right of suffrage with party members. *Beck v. Hummel*, 150 Ohio St. 127, 80 N.E. 2d 899, 906 (1948).

What the District Court has done is elevate the interest of political parties over the rights of independents and the *interest of free elections*. There is no warrant for this in the Constitution.

(We mentioned above that it was the joining of the filing requirements with the early Ohio primary that caused the early filing. As this is being written in September, 1970, several states are conducting party primaries for the elections in November. Ohio has thus chosen a May primary for reasons other than necessity. Perhaps the major parties should be allowed the early primary if they desire it, but surely they should not be permitted to force it upon independents.)

Of overriding importance is the fact that for many years Ohio conducted elections efficiently while having a filing date of no later than 60 days before the general election. Section 4785-92, Ohio General Code. The change in 1952—after the Henry Wallace candidacy—to the present rule has never been justified by Ohio on any basis. It cannot be. It was in fact part and parcel of that effort—so well described by Judge Kinneary in *Socialist Labor Party v. Rhodes, supra*—to remove all independents from the ballot.

The statute requiring independents to file as early as February received judicial scrutiny in the first *Socialist Labor Party* case. There the district court noted that the George Wallace candidacy was thwarted in part by the early filing rule. It said:

> Under Section 3513.25.8, Ohio Revised Code, a petition for nomination to state office as an independent candidate must be filed ninety days before the primary election rather than ninety days before the general election. *This is an unreasonable requirement.* (Emphasis added.) 290 F.Supp. 983 at 989.

When that case was appealed and decided *sub. nom., Williams v. Rhodes*, 393 U.S. 23 (1968), this Court left no doubt of its view of the early filing requirement. It said:

> The State also argues that its requirement of a party structure and an organized primary insures that those who disagree with the major parties and their policies "will be given a choice of leadership as well as issues" since any leader who attempts to capitalize on the disaffection of such a group is forced to submit to a primary in which other possibly more attractive leaders can raise the same issues and compete for the allegiance of the disaffected group. But while this goal may be desirable, Ohio's system cannot achieve it. Since the principal policies of the major parties change to some extent from year to year, and since

> the identity of the likely major party nominees may not be known until shortly before the election, this disaffected "group" will rarely if ever be a cohesive or identifiable group until a few months before the election. *Thus, Ohio's burdensome procedures, requiring extensive organization and other election activities by a very early date, operate to prevent such a group from ever getting on the ballot* and the Ohio system thus denies the "disaffected" not only a choice of leadership but a choice on the issues as well. 393 393 U.S. at 32. (Emphasis added.)

Conclusion

Ohio's early primary and filing system obviously favors the political parties whose machinery remains intact from election to election. Independent campaigns have no such cohesiveness. Usually their campaigns are marked by volunteer and amateur efforts. Frequently they surface late in the election year on the basis of issues which crystallize after the May party primaries.

The life blood of our democratic system is the election process. The government asks the loyalty and cooperation of the citizen on the premise that each citizen through his representative has a say in the laws under which we live. This Court, therefore, has condemned the fencing out of any group from the electoral process.

If states are able to erect and maintain barriers to the ballot of the sort challenged here, how are the arguments of the "disaffected" to be answered?

Respectively submitted,

BENJAMIN B. SHEERER,
Counsel for Appellant.

JERRY GORDON,
Of Counsel.

Text of Constitutional and Statutory Provisions

UNITED STATES CONSTITUTION

ARTICLE II

Section 1.

[2] Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Opposition

Supreme Court, U.S.
FILED
APR 7 1982
ALEXANDER L. STEVAS
CLERK

CASE NO. 81–1635

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

JOHN B. ANDERSON, *et al.*,
Petitioners,

v.

ANTHONY J. CELEBREZZE, JR.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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CASE NO. 81–1635

IN THE
SUPREME COURT OF THE UNITED STATES
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JOHN B. ANDERSON, *et al.*,
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ANTHONY J. CELEBREZZE, JR.,
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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

The respondent Anthony J. Celebrezze, Jr., Secretary of State of Ohio, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the decision of the Sixth Circuit in this case.

STATUTE

Ohio Revised Code Section 3517.01

(A) A political party within the meaning of Title XXXV [35] of the Revised Code is any group of voters which, at the last preceding regular state election, polled for its candidate for governor in the state or nominees for presidential electors at least five per cent of the entire vote cast for such office or which filed with the secretary of state, subsequent to any election in which it received less than five per cent of such vote, a petition signed by qualified electors equal in number to at least one per cent of the total vote for governor or nominees for presidential electors at the last preceding election, declaring their intention of organizing a political party, the name of which shall be stated in the declaration, and of participating in the next succeeding primary election, held in even-numbered years, that occurs more than one hundred twenty days after the date of filing. No such group of electors shall assume a name or designation which is similar, in the opinion of the secretary of state, to that of an existing political party as to confuse or mislead the voters at an election. When any political party fails to cast five per cent of the total vote cast at an election for the office of governor or president it shall cease to be a political party.

STATEMENT OF THE CASE

Petitioner John B. Anderson on June 8, 1979, announced his intention to seek the Republican nomination for President of the United States. At that time he was a Republican member of the United States House of Representatives. He had been elected to that office as a Republican every two years since 1960. The only other political office he ever held, the Winnebago County State Attorney, he also held as a Republican. He had never sought elective office as a member of any other political party or as an independent.

Thirty-six states had primary elections to elect delegates to the Republican National Convention. Petitioner Anderson arranged to have his name appear on the ballot as the nominee for President in twenty-seven of those states. During his campaign for the Republican nomination he raised over $6,600,000 including nearly $2,700,000 in federal matching funds.

It soon became apparent, however, that his attempt to gain the Republican nomination was "doomed to failure." (App. 2a.) He had been a candidate in nine primary elections and had failed to win a single one. By April 24, 1980, 535 delegates to the Republican National Convention had been awarded to candidates. Only 55 of those delegates had been awarded to petitioner Anderson. Over half of his delegates were from his home state of Illinois. Even in that state he had lost the election by a substantial margin and received only 28% of the state's delegates.

On April 24, 1980, petitioner Anderson abandoned his attempt to seek the Republican nomination and announced that he would be an independent candidate for President. He was careful to state, however, that even though he was to become an independent candidate, he would remain a member of the Republican party.

On May 15, 1980, petitioner tendered his nominating petition, containing approximately 16,000 signatures, and his statement of candidacy to respondent Anthony J. Celebrezze, Jr., the Secretary of State of Ohio. Respondent refused to accept them on the ground that they were not timely filed. Section 3513.257 of the Ohio Revised Code required that the statement of candidacy be filed by the 75th day before the first Tuesday after the first Monday in June or March 20, 1980.

On May 19, 1980, petitioner Anderson instituted this action in the United States District Court for the Southern District of Ohio claiming that the filing deadline violated his rights under the First and Fourteenth Amendments. Also named as plaintiffs in the action were petitioner George H. Hetrick, who had been designated to be an elector pledged to Anderson; petitioner Leslie Laufman, a registered voter in Ohio who wished to vote for Anderson; and petitioner Gerald M. Eisenstat, a registered voter in New Jersey who claimed the value of his vote would be diminished if Anderson were ineligible for Ohio's electoral votes.

Ohio provides alternate routes to the ballot for presidential candidates. Candidates who wish to run as independents are required to file a statement of candidacy and nominating petitions bearing the signatures of 5,000 qualified electors by the seventy-fifth day before the primary election, which in 1980 was March 20. Ohio Revised Code Section 3513.257. Candidates who choose to attempt to obtain the nomination of a political party by seeking delegates to the national convention have to file, on the same date as independent candidates, a declaration of candidacy and nominating petition bearing the signatures of 1,000 qualified electors who are members of the candidate's political party. Ohio Revised Code Section 3513.05.

Independent candidates for president who satisfy the filing requirements are automatically entitled to a place on the ballot in the general election. In Ohio such candidates are able to do so with regularity. In addition to petitioner Anderson, five independent candidates for President appeared on the ballot in 1980. In 1976 there were five independent candidates for President and three independent candidates for the United States Senate.

Partisan candidates for President, on the other hand, can only appear on the ballot if they are named by their political party. A political party earns the right to select its candidate by complying with the provisions of Ohio Revised Code Section 3517.01. Parties that obtained at least 5% of the vote in the last gubernatorial or presidential election are automatically entitled to a place on the ballot. A new party or one which did not obtain the required percent of the vote must file, 120 days before the primary election, nominating petitions bearing the signatures of qualified electors equal in number to 1% of the electors who voted in the last gubernatorial or presidential election. Such a party who wished to designate a presidential candidate for the general election of 1980 would have had to file its petition bearing the signatures of 28,000 electors by February 4, 1980.

The District Court held that the filing deadline was unconstitutional and ordered that petitioner Anderson's name be placed on the ballot. It found that the deadline substantially burdened the First Amendment rights of petitioner Anderson and his supporters. It also found that the deadline invidiously discriminated against independent candidates since political parties were not required to name their candidates until after their nominating conventions.

The District Court ruled that only a compelling state interest could justify the filing deadline. It recognized that the state had a compelling interest in political stability. It found, however, that the finding deadline was not intended to serve that purpose.

Petitioner Anderson appeared on the ballot in Ohio, and in every other state. He received approximately 7% of the vote nationally.

The Sixth Circuit reversed. It found that the decisions in **Sweetenham v. Rhodes,** 318 F.Supp. 1262 (S.D. Ohio E.D. 1970), *aff'd sub nom.*, **Sweetenham v. Gilligan,** 409 U.S. 942 (1972); and **Pratt v. Begley,** 352 F.Supp. 328 (E.D. Ky. 1970), *aff'd*, 409 U.S. 943 (1972), foreclosed the petitioners' First Amendment challenge to the deadline.

Nevertheless, the Court went on to consider the merits of the First Amendment claim, and it also considered the equal protection claim. It found that the state interests furthered by the filing deadline outweighed the minimal burden imposed upon access to the ballot.

REASONS WHY THE WRIT SHOULD BE DENIED

I. THE DECISION BELOW FOLLOWS THE PRINCIPLES ESTABLISHED IN THE APPLICABLE DECISIONS OF THIS COURT.

The Sixth Circuit in upholding the validity of the filing deadline merely applied the principles established by the applicable decisions of this Court. It first reviewed

two decisions of the lower courts which had upheld similar filing deadlines. In each of those cases, this Court summarily affirmed the decision of the lower court.

In **Sweetenham v. Rhodes,** 318 F.Supp. 1262 (S.D. Ohio E.D. 1970), independent candidates for Governor and Congress, who failed to comply with the Ohio filing deadline, challenged the vaiidity of that deadline. At that time the filing deadline was in early February. The District Court rejected the challenge. It found that the state had an interest in having all persons seeking elective office officially declare their intention to do so on, or before, a certain date preceding the election. *Id.* at 1273.

The candidates appealed to this Court. In their jurisdictional statement they claimed that where the state has required independent candidates to file their nominating petitions nine months before the general election and the requirement was not shown to be justified by any compelling state need, the filing deadline violated the First and Fourteenth Amendments. This Court rejected the claim and affirmed the judgment of the lower court. **Sweetenham v. Gilligan,** 409 U.S. 942 (1972).

The situation in **Pratt v. Begley,** 352 F.Supp. 328 (E.D. Ky. 1970), was substantially the same. Independent candidates challenged the March 31 filing deadline in Kentucky. The District Court found that the deadline was reasonable. On appeal this Court affirmed. 409 U.S. 943 (1972).

The Sixth Circuit also considered **Mandel v. Bradley,** 432 U.S. 173 (1977). In that case an independent candidate for Congress challenged the Maryland requirement of submitting signatures from 3% of the qualified

voters by March 8. This Court remanded the case for the lower court to determine whether a "reasonably diligent independent candidate" could satisfy the requirement.

The Sixth Circuit noted that there was no reason to remand the case to determine the difficulty of obtaining signatures if it were unconstitutional even to require a person to decide whether to run or not, by that date.

The Sixth Circuit, recongizing that decisions in **Sweetenham** and **Pratt** were decisions on the merits, found that they foreclosed the First Amendment challenges of the petitioners. Petitioners argue that the court gave an overly broad effect to those decisions. They claim that the candidates in those cases were so tardy in filing that they were not equitably entitled to relief. There is nothing in the opinion of either case that would indicate that this played any part in the decision. Both courts considered and rejected the merits of the constitutional challenge.

The Sixth Circuit noted that this Court did not decide **Sweetenham** and **Pratt** until long after the elections involved in those cases. By that time any decision based upon the equities had been mooted.[1] It, therefore,

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1. A decision on a question of equities, unlike a decision of constitutional law on an elections question, would not be one of those issues capable of repetition yet evading review which justify ignoring traditional mootness doctrine. *Cf.* **Storer v. Brown**, 415 U.S. 724, 737 n. 8 (1974).

found the only purpose of the judgment was to settle the constitutionality of the Ohio and Kentucky deadlines for future elections. (App. 10a.)

Contrary to the assertion of petitioners (Pet. 25), the court was not suggesting that, in the **Sweetenham** appeal, this Court had discretionary jurisdiction similar to certiorari jurisdiction. If, however, the Court felt that the only issue presented was one of the equities, it should have dismissed the case as moot rather than affirming the judgment of the lower court.

Respondent submits that, if anything, the Sixth Circuit gave too narrow an effect to those decisions. The plaintiffs in **Sweetenham,** in their jurisdictional statement, raised a constitutional challenge to the Ohio filing deadline (which at that time was even earlier) identical to that raised in this case. This Court rejected that challenge and affirmed the judgment of the lower court which upheld the validity of the deadline.

In **Mandel v. Bradley**, 432 U.S. 173, 176 (1977), this Court explained that summary affirmances without doubt reject the specific challenges presented in the statement of jurisdiction. Such decisions prevent lower courts from coming to opposite conclusions on the issues presented and necessarily decided by those actions. As an example this Court stated that if a summary decision invalidated a statute the lower courts were not free to find it constitutional.

In **Sweetenham** this Court rejected the very same constitutional challenge to the filing deadline now presented again. After this Court affirmed the validity of that deadline, the lower courts were not free to find it

unconstitutional. The Sixth Circuit, therefore, had no choice but to find that petitioners' First Amendment challenges were foreclosed.

Even though it found that the claims of petitioners were foreclosed, the Sixth Circuit went on to consider the merits of those claims. It found that the state interests served by the deadline outweighed any hardship to the interests of petitioners. It explained that the filing deadline advances the state's interest in having an informed electorate. It ensures that the voters will have the opportunity for a careful look at the candidates and a chance to see how they withstand the close scrutiny of a political campaign. Ohio could reasonably conclude that this would improve the ability of the voters to evaluate and choose among the candidates.

The court also found that the deadline informs the voters by a date certain what their options will be in the election. This serves the related interest in helping the voters to decide whether to lend their financial support or volunteer efforts to a candidate and for whom to vote in the primary. (App. 20a-22a.)

The court found that the impact of the deadline upon independent candidates and their supporters was not great. The signature requirement was minimal. Its only effect was to require persons to decide whether or not to become candidates seven and one-half months before the election. The court pointed out that most serious candidates would have made their decision by that time. (App. 23a-24a.)

Petitioners claim that the Sixth Circuit applied an improper test. They argue that since the filing deadline involved access to the ballot, the court should have required the state to demonstrate a compelling state interest.

This Court rejected a similar claim in **Storer v. Brown**, 415 U.S. 724 (1974). It pointed out that the states, in order to carry out their responsibility for conducting elections, had enacted comprehensive election laws which regulate in substantial ways the rights of both candidates and voters. Such regulation is necessary if elections are to be fair and honest and conducted in an orderly manner.

This Court explained that even substantial restrictions on the right to vote or to associate are not necessarily invalid. There is no litmus paper test for determining their validity. Labels cannot be substituted for the hard judgments which must be made by the courts. In each case the court must do what the Sixth Circuit did in this case: balance the state interests served against the interests of those who are disadvantaged.

The Sixth Circuit recognized that certain language in **Illinois State Bd. of Elections v. Socialists Workers Party**, 440 U.S. 173 (1979), could be read to require a compelling interest whenever a law affected access to the ballot. It found, however, that the language should be read in light of the facts in that case. The state itself had indicated that the requirement of a particular number of signatures for a Chicago candidate was unnecessary since it was substantially more than the state required of a state-wide candidate.

The Sixth Circuit found that a too literal construction of some of the language in **Illinois State Board** would be inconsistent with the broad power which the Constitution grants the states with respect to presidential electors and with the other applicable decisions of this Court.

That this Court has not required that a compelling state interest be shown for every regulation of ballot

access, whatever its burden, is easily established. When it is necessary to demonstrate a compelling state interest, a state must show that its law is necessary to protect that interest. If there are other ways to achieve its goal, the state must choose the least restrictive means. *See, e.g.*, **Dunn v. Blumstein,** 405 U.S. 330, 342-343 (1972). However, in **Jenness v. Fortson,** 403 U.S. 431 (1971), this Court approved a 5% signature requirement. This was substantially higher than that required in the vast majority of states. Georgia, therefore, could not have shown that this was the least restrictive alternative. Nevertheless, this requirement was upheld without the Court making any reference to a showing of compelling state interests.

In addition, there would have been no need for a remand in **Mandel** and **Storer,** to determine if a reasonably diligent candidate could satisfy the signature requirement, if those states had to establish compelling state interests in support of their statutes in the first instance simply because they regulated ballot access. Indeed, the lower court in **Mandel** had specifically found *no* compelling state interests in support of the Maryland statute. The obvious purpose of the remands was to determine as a factual matter if these ballot access regulations did severely burden constitutional rights. **Storer v. Brown,** 415 U.S. at 738. **Jenness, Mandel** and **Storer** were all cited with approval in the **Illinois Board case.** (App. 19a-20a.)

Petitioners understandably do not dispute the importance of the state's interest in having an informed electorate. This Court in **Buckley v. Valeo,** 424 U.S. 1, 14-15 (1976), explained that the ability of citizens to make informed choices among candidates is essential.

In addition, several courts have found the state's interest in having the voters be exposed to a candidate for a period of time is sufficiently important to justify

substantial residency requirements for candidates. *See, e.g.,* **Sununu v. Stark,** 383 F.Supp. 1287, 1290 (D. N.H. 1974), *aff'd,* 420 U.S. 958 (1975); **Hadnott v. Amos,** 320 F.Supp. 107, 119 (M.D. Ala. 1969), *aff'd,* 401 U.S. 968 (1971).

Petitioners claim, however, that the filing deadline does not require all candidates to be in the public eye for a certain period of time. Political parties are permitted to place their candidates on the ballot even if those candidates did not enter Ohio's primary. They also claim that, by not formally excluding such party candidates from the ballot, Ohio has invidiously discriminated against independent candidates.

However, as the Sixth Circuit recognized, most serious candidates will have made a decision to run for President long beofre Ohio's filing deadline. (App. 24a.) With the proliferation of presidential primaries in the 1970's, it is unrealistic to expect party candidates to surface for the first time at party conventions. Statutory requirements are to be viewed in light of realities for purposes of the equal protection clause since they are "not to be upset upon hypothetical and unreal possibilities, if [they] would be good upon the facts as they are." **Pullman Co. v. Knott,** 235 U.S. 23, 26 (1914).

All candidates for the presidency in Ohio, persons seeking delegates to their party's national convention as well as independents, are required to file on the same date. Candidates seeking that office in 1980 were required to file on March 20, 1980.

Independent candidates who complied with the filing requirement were assured of a place on the ballot. Partisan candidates who did so were not. In order to appear upon the ballot a partisan candidate must be nominee of his party.

Petitioners are apparently claiming that since the political parties do not have to select their candidates until after the national convention, independent candidates should also be able to qualify at that time. There are obvious differences between the needs and potential of organized political parties and those of independent candidates. Ohio has recognized these differences and provided different routes to the printed ballot. A state may properly do so since, as this Court has explained, "[s]ometimes the grossest discrimination can be in treating things that are different as though they were exactly alike." **Jenness v. Fortson,** 403 U.S. at 442.

The Sixth Circuit properly pointed out that the political parties have rights of their own separate from the interests of their candidates. (App. 26a-27a.) This Court has explained that a national political party enjoys a constitutionally protected right of political association. **Democratic Party v. LaFollette,** 450 U.S. 107, 101 S.Ct. 1010, 1018-1019 (1981); **Cousins v. Wigoda,** 419 U.S. 477, 487 (1975). It has also explained the great national importance of the party's selection of its national candidates. *Id.* at 490; *Id.* at 491 (Rehnquist, J., concurring).

Thus, although political parties may select their presidential candidates at their conventions in the summer, they must earn the right to so select the candidates before independent candidates need do anything at all. They must either obtain 5% of the total vote in the preceding gubernatorial or presidential election or file a petition 120 days before the primary signed by electors equal in number to 1% of the voters at the preceding gubernatorial or presidential election. A political party which wished to select a candidate in 1980 and had not earned sufficient support in the preceding election would have had to file by February 4, 1980, 45 days before independent candidates, a petition signed by approximately 28,000 electors, 23,000 more than independent candidates.

Ohio has provided different routes to the ballot for independent candidates and political parties. This court, however, has approved such a procedure so long as it does not constitute an "invidious discrimination" against one of the classes. **American Party of Texas v. White,** 415 U.S. 767, 781-782 (1974); **Jenness v. Fortson,** 403 U.S. at 441-442.

Petitioners cannot show that the Ohio procedure discriminates against independent candidates. If anything it discriminates in favor of those candidates and against partisan candidates and political parties. Independent candidates are assured of a place on the ballot if they satisfy the filing requirement. Partisan candidates are not. The qualification requirements are much more lenient for independent candidates than for political parties. An independent candidate for President in 1980 could qualify by filing a petition containing the signatures of 5,000 electors by March 20, 1980. For a political party to select a presidential candidate, it had to have obtained 5% of the total vote in the preceding gubernatorial or presidential election or file a petition containing the signatures of 28,000 qualified electors by February 4, 1980.

The Sixth Circuit also pointed out that all that voters know about an independent candidate is what they know about him as an individual. The same is not true with partisan candidates. A voter knows a significant amount about such a candidate if he knows about the party he represents. There is, therefore, not the same need for partisan candidates to be exposed to the voters for a significant period. (App. 27a-28a.)

Petitioners also claim that the Sixth Circuit minimized the burdens of the filing deadline. They argue that the deadline affects not only the interests of the candidate but also the interests of independent voters.

This is true of any regulation of access to the ballot. This Court has explained that the interests of candidates and their supporters are intertwined. Any law that affects candidates will have some correlative effect on the voters. **Bullock v. Carter,** 405 U.S. 134, 143 (1972).

The disaffiliation requirement upheld in **Storer v. Brown,** *supra,* 415 U.S. 724, obviously affected not only the candidates but also their supporters and potential supporters. That requirement was substantially more restrictive than the Ohio filing deadline. It required a person to decide to run as an independent a full year before the *primary* election.

As the Sixth Circuit explained, most serious candidates for the presidency would have made their decision to run long before the Ohio filing deadline. The deadline would mainly affect candidates in the position of petitioner Anderson. He had made his decision to run for the presidency long before the deadline. It was only when he found that he would be unable to obtain the Republican nomination that he decided to run as an independent.

To the extent that the Ohio deadline excludes such candidates, it serves the same interests in political stability which this Court found sufficient to uphold the more stringent disaffiliation requirement in **Storer.**

The minimal effect of the burden of the filing deadline is shown by past history in Ohio. The Sixth Circuit found that the "reasonably diligent independent candidate" test is of "limited usefulness in assessing burdens other than the difficulty of collecting signatures." (App. 17a.) However, respondent submits that this Court's direction to look to past experience is also a helpful guide in the instant case.

In contrast with the laws involved in **Williams v. Rhodes**, 393 U.S. 23 (1968), which gave the two existing major political parties a virtual monopoly on the ballot, it is not "only rarely" that an independent candidate will satisfy the Ohio filing deadline. Independent candidates for the presidency have qualified with regularity in Ohio. Five independent candidates for President, other than petitioner Anderson, qualified for the ballot in 1980 and five qualified in 1976. *Compare* **Storer v. Brown**, *supra*, 415 U.S. at 743.

Respondent submits that the Sixth Circuit applied the test established by the applicable decisions of this Court for determining the validity of the filing deadline: It balanced the interests served by the dealine against the interest of those who claim to be disadvantaged by the deadline.

The Sixth Circuit also properly found that the minimal burden upon the candidate of anticipating his candidacy for President seven and one-half months before the election was outweighed by the state interest in advancing the ability of the electorate to evaluate and choose among the candidates and the interests of political parties in selecting candidates who will best represent their views.

Respondent submits that the decision below merely applies principles established in the applicable decisions of this Court and does not warrant review by this Court.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON ANY GENERAL PRINCIPLES OF LAW.

Petitioners claim that the decision below is in conflict with the decisions of the Court of Appeals in **Anderson v. Quinn,** 634 F.2d 616 (1st Cir. 1980); and **Anderson v. Morris,** 636 F.2d 55 (4th Cir. 1980). Respondent concedes that those cases, which also involved the candidacy of petitioner Anderson, reached *results* different from that below. He submits, however, that an examination of the laws and state interests involved in those cases, shows that there is no conflict among the circuits in general principles of law regulating access to the ballot.

Ohio election statutes are significantly different from those in Maine and Maryland. Since the interests served by regulation of ballot access differ depending upon the nature of the regulation, the differing *result* reached by the Sixth Circuit reflects no true conflict among the circuits but simply different state regulatory schemes. In Ohio all candidates for the presidency, those seeking delegates to the national convention as well as independents, are required to file on the same day. The state laws involved in the other cases did not have a similar requirement.

Maine did not have a presidential primary. The law involved in **Anderson v. Quinn,** *supra,* 634 F.2d 616, therefore, contained no filing deadline for partisan candidates for President. Only independent candidates were required to file.

Under the Maryland law involved in **Anderson v. Morris,** *supra,* partisan candidates did not have to file a petition in order to obtain delegates to the national convention. The Secretary of State could still place such a candidate's name on the ballot for the primary election.

Neither of the other courts considered the effect of the summary decisions of this Court upholding similar deadlines. Those decisions may have been more apparent to the court below since **Sweetenham** upheld the validity of the more stringent predecessor of the law involved in the instant case.

Respondent submits that the other courts should have considered those decisions. They are decisions on the merits which are binding on all of the lower courts until this Court tells them otherwise. **Hicks v. Miranda,** 422 U.S. 332, 344-345 (1975).

Neither of the other cases considered the interests of a political party in selecting its candidate. At the time of those decisions, those courts did not have the benefit of this Court's decision in **Democratic Party v. LaFollette,** *supra,* 450 U.S. 107. In that case this Court reaffirmed the principle that national political parties enjoy a constitutionally protected right of political association.

Neither case considered the state interest in having an informed electorate. As the Sixth Circuit explained, the filing deadline advances this interest by giving the voters the opportunity for a careful look at the candidates for a significant period of time.

This Court, in its previous decisions, has established the principles governing laws regulating access to the ballot. A court is to balance the interests served by the law against the interests of those who claim to be disadvantaged by the law.

The Courts of Appeals for the First and Fourth Circuits did not consider in their balancing all of the state interests considered by the Court of Appeals for the Sixth Circuit, possibly because of differences in the state statutes involved. There is, therefore, no conflict between those decisions and the one below on any general principles governing access to the ballot.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Respondent in Opposition was sent this 7th day of April, 1982 by United States first class mail, postage prepaid, to Mitchell Rogovin, Rogovin, Huge & Lenzner, 1730 Rhode Island Avenue, N.W., Suite 1100, Washington, D.C. 20036, Counsel for Petitioners.

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Office - Supreme Court
FILED
JUL 17 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1635

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN B. ANDERSON, GEORGE H. HETRICK, LESLIE LAUFMAN, M.D., GERALD M. EISENSTAT,
Petitioners,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of the State of Ohio,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTIONS PRESENTED

1. Whether, in violation of the First and Fourteenth Amendments, Ohio invidiously discriminates against independent presidential candidates and burdens their constitutional rights and those of their supporters and electors, by requiring independent presidential candidates to qualify to appear on the general election ballot five months before partisan presidential candidates and eight months before the general election.

2. Whether the Court of Appeals applied an erroneous standard of review, in conflict with decisions of this Court and of other Courts of Appeals, in upholding Ohio's discriminatory and burdensome filing deadline requirements for independent presidential candidates.

3. Whether Ohio's March 20 filing deadline, as applied to independent presidential candidates, is impermissibly inconsistent with the unique presidential selection process contemplated by Art. II, § 1 of the Constitution.

4. Whether the Court of Appeals erred in concluding that this Court's summary affirmances in *Sweetenham v. Gilligan*, 409 U.S. 942 (1972) and *Pratt v. Begley*, 409 U.S. 943 (1972) control the disposition of this case.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1635

JOHN B. ANDERSON, GEORGE H. HETRICK, LESLIE LAUFMAN, M.D., GERALD M. EISENSTAT,
Petitioners,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of the State of Ohio,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals, *Anderson v. Celebrezze*, is reported at 664 F.2d 554 (6th Cir. 1981), and is set forth in Appendix A to the Petition for Certiorari.[1] The decision of the United States District Court for the Southern District of Ohio is reported at 499 F. Supp. 121 (S.D. Ohio 1980) and is set forth in Appendix B to the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1981. On January 8, 1982, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including March 4, 1982, on

[1] Citations to the Appendix filed with the Petition for Certiorari in this case, in which the opinions of the courts below are reprinted are cited as "Cert. App.".

which date the petition was filed. On May 3, 1982, this Court granted certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The statute challenged by petitioners is Ohio Revised Code Ann. § 3513.257 (Page 1981), which is set forth in relevant part at Cert. App. 87a. Petitioners' challenge is based on the First and Fourteenth Amendments and on Art. II, § 1 and Art. VI of the United States Constitution, set forth in relevant part in Cert. App. 81a-82a.

STATEMENT OF THE CASE

Section 3513.257 of the Ohio election statutes requires that independent candidates seeking a position on Ohio's ballot for President of the United States file a statement of candidacy and nominating petitions bearing the signatures of at least 5,000 qualified voters by the 75th day before the June primary election immediately preceding the general election. Thus, in 1980 an independent presidential candidate was required to submit his statement of candidacy no later than March 20, some 229 days before the general election and approximately five months prior to the time that Ohio law requires the party candidates for President to be identified. *See* Ohio Rev. Code Ann. § 3505.10 (Page 1981).

Petitioner Anderson, then a Republican Congressman from Illinois, was in the winter and spring of 1980 an active candidate for the Republican nomination for President. When it became apparent that his principal political support was derived less from active Republican party members than from a cross-section of voters including Democrats and Independents as well as Republicans, *see* Jt. Stip. ¶¶ 13-15, Cert. App. 69a-71a, and Exhibits B-F thereto;[2] Opinion of the District Court,

[2] Citations to the Joint Stipulation of Fact agreed upon by the parties in the District Court, and attached by that Court to its opinion as its Findings of Fact, are cited as "Jt. Stip."

Cert. App. 38a-39a, Anderson on April 24, 1980, abandoned his quest for the Republican nomination and announced that he would seek the presidency as an independent candidate. Immediately thereafter his supporters began a nationwide effort to place him on the ballot in every state.

Between May 10 and 15, 1980, Anderson supporters in Ohio mounted a petition drive to gather the required number of signatures. On May 16, they presented to Respondent a statement of candidacy and nominating petitions containing approximately 14,500 signatures of Ohio registered voters. Respondent refused to accept the tender on the sole ground that the March 20 deadline for filing had passed. Jt. Stip. ¶¶ 9, 10, Cert. App. 68a-69a. On May 19, 1980, Petitioners Anderson and three of his supporters[3] filed this action in the District Court, contending that the early deadline provision of Ohio's law violated the First and Fourteenth Amendments to the United States Constitution, as well as Art. II, § 1 and Art. VI, cl. 2. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343(3), 2201-02, as well as 42 U.S.C. § 1983.

On cross motions for summary judgment, the District Court concluded that the Ohio deadline as applied to independent presidential candidates imposed a substantial burden on the Petitioners' fundamental constitutional

[3] The other Petitioners are individuals who wished to support petitioner Anderson's presidential campaign. Petitioner Leslie Laufman, M.D. is a duly registered Ohio voter who wished to cast her vote for petitioner Anderson in the general election, and petitioner George H. Hetrick, also a registered voter in Ohio, was designated to seek certification as a candiate for presidential elector pledged to petitioner Anderson's candidacy. Petitioner Gerald M. Eisenstat is a duly registered voter in the State of New Jersey, which, at the time this case was initiated in the District Court, had certified petitioner Anderson's name for inclusion on its election ballot. Petitioner Eisenstat maintained that exclusion of petitioner Anderson from the ballot in Ohio, the sixth most populous state, would dilute the impact of his vote in New Jersey.

rights to associate for the advancement of political beliefs and to vote for the candidate of their choice. Cert. App. 64a. The Court further ruled that the Ohio deadline invidiously discriminated between independent and partisan candidates for President. Finding that this burden and the discrimination among candidates for the same office were not justified by the interests that the State had advanced in its support—promoting equality of treatment by requiring independent candidates to file at the same time as primary contestants, and furthering political stability by requiring early disaffiliation of independents—the District Court ruled that Ohio's early filing deadline, as applied to independent Presidential candidates, was invalid,[4] and ordered Respondent to place Petitioner Anderson's name on the general election ballot as an independent candidate for President if he otherwise met the qualifications of Ohio law.[5] In the November 1980 general election, Petitioner Anderson's name appeared on the ballot in all fifty states. He received approximately 7% of the popular vote nationwide, and approximately 6% of Ohio's popular vote.

The Court below, disagreeing with decisions in similar cases in the First and Fourth Circuits,[6] reversed the

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[4] The District Court accordingly did not decide whether the early filing deadline was inconsistent with Art. II § 1 and the Supremacy Clause, Art. VI. Cert. App. 32a n.1.

[5] Respondent thereafter petitioned this Court to grant a writ of certiorari prior to judgment in the Court of Appeals. On September 18, 1980, this Court denied the petition, thus allowing the case to proceed to the Sixth Circuit. *See Celebrezze v. Anderson*, 448 U.S. 918 (1980). Justices Stewart, White and Rehnquist dissented.

[6] In four states in addition to Ohio, Anderson and his supporters filed suit to challenge the constitutionality of early filing deadlines falling in March and early April, on the same grounds set forth in this action. In three of these states—Maine, Maryland and New Mexico—plaintiffs prevailed on constitutional grounds. *Anderson v. Quinn*, 495 F. Supp. 730 (D. Me. 1980); *Anderson v. Morris*, 500 F. Supp. 1095 (D. Md. 1980); *Anderson v. Hooper*, 498 F. Supp. 898 (D.N.M. 1980). The Kentucky case was decided in Anderson's

District Court on two grounds. First, the court determined that the summary affirmances of *Sweetenham v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub nom. Sweetenham v. Gilligan*, 409 U.S. 942 (1972), and *Pratt v. Begley*, 352 F. Supp. 328 (E.D. Ky. 1970), *aff'd*, 409 U.S. 943 (1972), signalled this Court's intention to settle the constitutionality of Ohio's (and Kentucky's) early filing deadlines for future elections. Cert. App. 10a. Alternatively, the Sixth Circuit concluded that the District Court erred in requiring Ohio "to prove too much." *Id.* at 18a. Although it acknowledged that this Court's decisions in *Storer v. Brown*, 415 U.S. 724 (1974) and *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), appeared to require that a state demonstrate that discriminatory ballot access restrictions on independent candidates are necessary to further some compelling state interest, the Court of Appeals instead determined that the burdens imposed on the presidential electoral process by Ohio's early filing deadline could be justified by some "lesser interests" that are "rationally further[ed]" by the statute in question. Cert. App. 18a, 22a. The court noted that the state's chosen deadline was entitled to "a good deal of deference," *id.* at 23a, and then, ignoring the interests advanced by the state, proceeded to construct its own rationale for the statute—enhancing voter knowledge of candidates. *Id.* at 20a. The Sixth Circuit concluded that the Ohio law "rationally" furthered that interest and thus justified the resulting infringement on ballot access.

On May 3, 1982, this Court granted certiorari to review the decision of the Court of Appeals.

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favor on state law grounds. *Anderson v. Mills*, 497 F. Supp. 283 (E.D. Ky. 1980), *aff'd in relevant part*, 664 F.2d 600 (6th Cir. 1981). State officials in Maine and Maryland appealed, and the district court decisions in those states were affirmed by unanimous panels of the Courts of Appeals for the First and Fourth Circuits, respectively. *Anderson v. Quinn*, 634 F.2d 616 (1st Cir. 1980) (per curiam); *Anderson v. Morris*, 636 F.2d 55 (4th Cir. 1980).

SUMMARY OF ARGUMENT

I. Ohio discriminates between independent presidential candidates, who must fully qualify for the November general election ballot by March of the election year, and major or minor party presidential candidates, who need take no action in Ohio until sometime in late August. This discriminatory filing deadline has a substantial impact on the exercise of fundamental First Amendment and voting rights by both independent candidates and independent-minded voters. Particularly in the presidential context, groups of disaffected voters presenting the natural constituency for a third-force candidacy are not likely to emerge until well into the election year. *Williams v. Rhodes*, 393 U.S. 23 (1968). Yet an early filing deadline absolutely and completely bars independent-minded voters from seeking to promote any independent candidate for the general election after March 20. In this respect, a deadline is a much greater burden on the rights of independent voters than a disaffiliation rule or other criteria relating to a candidate's individual qualifications. The Court of Appeals erred in its apparent conclusion that independent voters, an increasingly important part of the American electorate, have no associational interests in coalescing around a late-emerging independent candidate comparable to the interests of party voters.

Accordingly, Ohio's discriminatory filing deadline can only be sustained if necessary to further a compelling state interest. The "reasonably diligent candidate" standard urged by the State below, and properly rejected by both the District Court and the Court of Appeals, is not the appropriate test of the deadline's constitutional validity; that test measures the extent to which a state can implement its recognized interest in requiring a candidate to demonstrate substantial community support through submission of a particular number of petition signatures—an issue not present here.

II. The Court of Appeals, without disputing the District Court's conclusion that this filing deadline could not meet the "compelling interest" standard, ignored the interests asserted by the State to justify the deadline and constructed its own rationale—that the filing deadline was intended as a voter education measure. But Ohio law makes no effort to assure early voter exposure to major or minor party candidates. A filing deadline is, moreover, ineffective toward such a goal even as to independents since it does not require the candidate to come to Ohio or otherwise ensure opportunities for Ohio voters to evaluate the candidate's conduct in the heat of a campaign, as the Court of Appeals opined. And it is inconsistent with the realities of presidential elections in which voter decisions are made based on information about candidates' activities across the nation. Finally, the rationale constructed by the Court of Appeals is inconsistent with the actual history of Ohio's early filing deadline, and with the practices in other states.

Nor do the interests asserted by the State below sustain this statute. Conceding that no administrative needs are at issue, Ohio argued that the filing deadline assures "equality" of treatment, ignoring the fact that partisan presidential nominees need not file for or participate in its primary, or take any other action in Ohio prior to late summer, in order to appear on its general election ballot. The State also asserted that the deadline functions as a "sore loser" device to prevent unsuccessful primary candidates from running as independents in the general election, a claim that founders on the fact that Ohio has a "sore loser" statute, which did not bar Anderson's candidacy because of his timely withdrawal from Ohio's primary. The State's claim that the deadline functions as a "disaffiliation" provision likewise fails since the deadline neither excludes party members from running as independents if they file early nor permits "true" independents ballot access if they file after March 20. Finally, since Ohio law permits candidates simultaneously

to seek ballot access through independent and party processes, the State's argument that the deadline was intended to preserve separate routes to the ballot was properly rejected.

Indeed, as both courts below concluded, Ohio's effort to rely on *Storer v. Brown*, 415 U.S. 724 (1974), to support this deadline was doomed to failure by the unique aspects of the presidential election. Unlike the disaffiliation clause upheld there, which was found to be part of a general and nondiscriminatory state policy furthering the integral role of that state's primary in congressional elections, Ohio's filing deadline discriminates substantially against independents, and does not effectively promote the integrity of its party primary because that primary does not in fact choose the party's presidential nominee.

III. Ohio's unreasonably early filing deadline is inconsistent with the national interests in a presidential selection process that involves all of the people and all of the states. This Court has itself recognized that state interests compelling in other contexts are of diminished import in the presidential selection process. *Cousins v. Wigoda*, 419 U.S. 477 (1975). By precluding substantial candidacies so early in the process, Ohio in effect gives an *a priori* electoral handicap, not contemplated by the Constitution, to late-emerging candidates. This effect is inconsistent with the intent of the Framers and of Congress, who sought to prevent undue influence in the electoral process by one or a few states, by requiring that the dates on which electors were chosen and cast their votes be uniform throughout the country.

IV. This Court's summary affirmance in *Sweetenham v. Gilligan*, 409 U.S. 942 (1972), did not and could not have disposed of the questions presented herein. The candidates in *Sweetenham* were running, not for the Presidency, but for Governor and Senate. Likewise, plaintiff in *Pratt v. Begley*, 409 U.S. 943 (1972), was a candidate for congressional office. In those cases, therefore, all candidates, partisan and independent, who sought to appear

on the November ballot were in fact required by state law to file nominating petitions at the same time. Moreover, plaintiffs in both cases had failed to make any effort to qualify for the ballot until long after the party primaries had been held, and thus lacked equitable grounds for relief. The District Courts' decision in each of these cases could have rested on any of these grounds, and this Court's affirmance of those judgments in no way disposed of the issues presented herein.

ARGUMENT

I. OHIO'S EARLY FILING DEADLINE IS BOTH DISCRIMINATORY AND BURDENSOME, AND CAN ONLY BE SUSTAINED IF IT FURTHERS COMPELLING STATE INTERESTS.

A. Because Ohio's Filing Deadline Discriminates Between Independents And Partisans With Respect To The Exercise Of Fundamental Rights, It Can Be Sustained Only By A Compelling State Interest.

Ohio law requires any person seeking to appear on that state's general election ballot as an independent candidate for President to file nominating petitions and a declaration of candidacy with the Secretary of State on or before the 75th day prior to the primary election preceding that general election. Ohio Rev. Code § 3513.257 (Page 1981). In 1980, this date was March 20. No such requirement applies to those seeking to become party candidates for President—whether candidates of a major or minor party. Such candidates are free, insofar as Ohio law is concerned, to postpone until much later in the year the decision to declare their candidacy and to commit resources to such a race. Indeed, prospective party candidates for President need never declare their candidacy, register with Ohio's Secretary of State, participate in Ohio's June presidential primary or otherwise appear or campaign in the State of Ohio. If certified by their party officials to the Secretary of State following the convention or within 75 days of the general election (*i.e.*, in late

August), the names of party candidates will appear on Ohio's general election ballot. Ohio Rev. Code Ann. §§ 3505.10, 3513.11 (Page 1981).

Ohio thus discriminates between independent and partisan presidential contenders, requiring independent candidates to declare their candidacies and fully qualify for the ballot approximately five months before partisan candidates need do so. This discrimination—permitting the major party nominee to emerge as late as the summer conventions while forcing independents to enter the race and fully qualify by March—is both real and substantial. The Court of Appeals sought to minimize this statutory discrimination by suggesting it was "hypothetical and unreal." Cert. App. 24a, n.15. In so doing, it ignored the lessons of history, which demonstrate that major parties do nominate persons who were neither declared candidates nor widely regarded as potential contenders in March or April of the election year, and who failed to enter state primaries.[7] This discrimination against independent presidential candidates and their supporters violates both the Equal Protection clause and First Amendment of the United States Constitution.

Ballot access restrictions such as Ohio's "place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, re-

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[7] Following President Johnson's announcement in late March 1968, that he would not seek reelection, Hubert Humphrey was the Democratic nominee, even though his name did not appear on the primary ballots. In 1952, Dwight Eisenhower did not declare his candidacy until June, and his name had been entered in only eight primaries. The Democrats in 1952, moreover, nominated Adlai Stevenson by a floor draft, notwithstanding his failure to seek nomination or to participate in most primaries (including Ohio's), and the overwhelming primary victories that Estes Kefauver had enjoyed. Congressional Quarterly, Inc., *Presidential Elections Since 1789*, 161-63, 151-53, (2d ed. 1979); E. H. Roseboom, *A History of Presidential Elections*, 509 (2d ed. 1964); T. H. White, *The Making of the President, 1968*, 107-25 (1969).

gardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). As the Court also there noted,

> [b]oth of these rights . . . rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment. . . [a]nd is entitled under the Fourteenth Amendment to the same protection from infringement by the states. Similarly we have said with reference to the right to vote: 'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which as good citizens we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.'

Id. at 30-31, *quoting Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). The Court went on to conclude that Ohio law at that time gave the "two old, established parties a decided advantage over any new parties struggling for existence and thus placed substantially unequal burdens on both the right to vote and the right to associate." 393 U.S. at 31. Accordingly, the Court found that *only* " 'a compelling state interest in the regulation of a subject within the state's constitutional power to regulate can justify limiting such First Amendment freedoms.' " *Id.*, *quoting*, *NAACP v. Button*, 371 U.S. 415, 438 (1963).

This principle has been repeatedly recognized and adhered to by this Court. Thus, in *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973), the Court noted that, "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments." In holding unconstitutional a 23-month waiting period for voters who wished to change parties and participate in different primaries the Court emphasized that:

> [o]ur past decisions have made clear [that] a significant encroachment upon associational freedom

> cannot be justified upon a mere showing of a legitimate state interest. . . . For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty. . . . 'Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP v. Button*, 371 U.S. at 438.

414 U.S. at 58-59 (citations omitted). In *American Party v. White*, 415 U.S. 767, 780 (1974), this Court again emphasized that

> whether the qualifications for ballot position are viewed as substantial burdens on the right to associate or as discriminations against parties not polling 2% of the last election vote, their validity depends upon whether they are necessary to further compelling state interests. *Storer v. Brown*, 415 U.S. at 729-33.

In two recent ballot access cases, each involving a claim of denial of equal protection arising out of differing requirements imposed on candidates for different offices, this Court adhered to the decisions and standards articulated in *Williams*, *American Party*, and *Storer*. In *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979), the Court struck down an Illinois signature requirement for independent candidates that was more onerous in absolute terms for city office in Chicago than for statewide office, noting that, "[w]hen such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." More recently, in *Clements v. Fashing*, 50 U.S.L.W. 4869 (U.S., June 25, 1982), the Court upheld differing resign-to-run provisions for different offices against an equal protection attack. While a majority of the Court did not agree on the particular standard of review applicable in that factual setting, all members of the Court recognized that "traditional equal protection analysis" is not sufficiently protective of fundamental rights in cases "involv[ing] classifi-

cation schemes that impose burdens on new or small political parties or independent candidates." 50 U.S.L.W. at 4871 (Rehnquist, J., joined by Burger, Powell and O'Connor, JJ.); *id.* at 4874 (Stevens, J., concurring separately); *id.* at 4875 n.2 (Brennan, J., joined by White, Marshall, and Blackmum, JJ.). *See also Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 189 (Stevens, J., conc'g). Thus, whatever may ultimately be determined to be the correct standard of review in ballot access cases *not* involving claimed discrimination among candidates for the same office based on party affiliation, the law is both clear and well-established that only a compelling state interest, narrowly pursued, will justify the discriminatory burdens imposed by this Ohio law on independent presidential candidates.[8]

B. Ohio's Discriminatory Deadline Impermissibly Burdens Rights of Independent Voters As Well As Candidates.

The burdens imposed by Ohio's early filing deadline are plainly substantial with respect to both candidates and voters. First, the deadline absolutely precludes any independent candidate from appearing on the November general election ballot unless the candidate affirmatively commits himself to the campaign sufficiently in advance of March 20 to gather the necessary signatures. Although no "fundamental" right to candidacy has been recognized, this Court has insisted that, even in local elections, citizens "have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." *Turner v. Fouche,* 396 U.S. 346, 362-63 (1970). Yet the March 20 date is often earlier than when the most likely party candidates can

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[8] Cf. *Mathers* v. *Morris,* 515 F. Supp. 931 (D. Md.), *aff'd,* 649 F.2d 280, *aff'd,* 102 S. Ct. 467 (1981); *see also, Citizens Against Rent Control v. City of Berkeley,* 102 S. Ct. 434 (1981).

be identified or have even entered the race, and is long before serious campaigning begins for the Presidency itself, as opposed to the party nominations for that office. As this Court has recognized, "an individual candidat[e] [has an] important interest in the continued availability of political opportunity," *Lubin v. Panish*, 415 U.S. 709, 716 (1974), particularly when that opportunity is still available to his competitors.

More important than the interests of candidates as such, however, are the interests of citizens who wish to support and vote for such candidates. This Court has frequently observed that ballot access restrictions burden not only candidates' rights, but rights of voters and citizens, since "voters can assert their preferences only through candidates or parties or both. . . ." *Lubin v. Panish*, *supra*, 415 U.S. at 716; *accord*, *Illinois State Board of Elections v. Socialist Workers Party*, *supra*, 440 U.S. at 184; *Bullock v. Carter*, 405 U.S. 134, 142-43 (1972). Of course, any challenged ballot restriction may, in a particular case, adversely affect the interests of those voters who wish to cast their vote for a particular candidate. This factor alone may not condemn the provision. But a filing deadline such as this one has a substantial impact on the exercise of protected rights by a broad spectrum of voters and citizens.

Ohio's deadline, by its very nature, absolutely and completely bars *all* independent-minded voters, regardless of the particular candidate they may seek to support, from gathering behind *any* independent candidate for election on the November ballot after early March. In this respect, an early filing deadline is a much more substantial abridgement of the rights of voters and citizens than any individually tailored candidate qualification criterion. A disaffiliation provision, such as that at issue in *Storer v. Brown*, may preclude voters from supporting a particular candidate who has not taken early steps to assure his true independence. Such voters remained free, however, under the election laws then in

effect in California, to decide as late as the end of the summer to seek out, support and promote other independent candidates not disqualified through the disaffiliation requirement. *Storer v. Brown*, *supra*, 415 U.S. at 727, 753. In Ohio, by contrast, independent-minded voters, such as petitioners Hetrick and Laufman, who may not be satisfied with the choices likely to emerge from the major party nominating processes, are absolutely precluded from seeking to advance any independent candidate unless they act to support and promote a particular candidate prior to March 20.

This is a particularly significant discrimination against this class of voter because, as this Court and the lower courts have recognized, candidates and issues often tend to emerge with clarity only a few months before the general election. Thus, in *Williams v. Rhodes*, this Court rejected Ohio's attempt to justify its then-existing electoral scheme on the ground that it would encourage competition and choice in the leadership of the group of disaffected voters, noting:

> "while this goal may be desirable, Ohio's system cannot achieve it. Since the principal policies of the major parties change to some extent from year to year, and since the identity of the likely major party nominees may not be known until shortly before the election, this disaffected 'group' will rarely if ever be a cohesive or identifiable group until a few months before the election."

393 U.S. at 33.[9] The late emergence of issues or candidates around whom large numbers of disaffected voters may wish to rally is "particularly true" in the presiden-

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[9] *See Rosario v. Rockefeller*, 410 U.S. 752, 769 (1973) (Powell, J. dissenting) ("candidates or issues often are not apparent eight to eleven months before [the election]"). *See also Salera v. Tucker*, 399 F. Supp. 1258, 1266 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976); *McLain v. Meier*, 637 F.2d 1159, 1164 (8th Cir. 1980); *McCarthy v. Noel*, 420 F. Supp. 799, 803 (D.R.I. 1976); *McCarthy v. Kirkpatrick*, 420 F. Supp. 366 (W.D. Mo. 1976); *Bradley v. Mandel*, 449 F. Supp. 983, 986 (D. Md. 1978).

tial selection process, *MacBride v. Exon*, 558 F.2d 443, 449 (8th Cir. 1977), where the party platforms and nominees are not selected until July or August and the most likely nominees often cannot even be predicted in March. Indeed, recent history abounds with dramatic and unexpected events occurring late in the primary season that completely changed the complex of presidential issues and candidates that confronted the voters in November.[10]

This group of independent voters on whom the discriminatory burden of Ohio's early filing deadline falls most heavily has been growing significantly in recent years. "Perhaps the most dramatic political change in the American public over the past two decades," one leading study observed, has been the decline of partisanship, resulting in a substantial decrease in the proportion of voters with strong partisan attachments to either the Democratic or Republican Party, while those identifying themselves as independent voters increased from about 23% of the electorate in the early 1950's to

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[10] For example, President Lyndon Johnson announced his decision not to seek a second term in late March 1968, and unexpected acts of violence further changed the context of the party nominations that year. *See* note 7, *supra*. As Justice Stevens observed in *Mandel v. Bradley*, 432 U.S. 173, 181 (1977) (dissenting), "[t]he decision to become a candidate may be prompted by a sudden, unanticipated event of great national or local importance." And the history of American politics shows that many significant third-force candidates have emerged relatively late in the Presidential nominating process, as coalitions of voters who find their preferences not being met through the major party processes coalesced around candidates. Thus, Theodore Roosevelt's Bull Moose campaign for the presidency began in August, 1912, following the Republican convention, and LaFollette's "Progressive" party arose in 1924 following the Democrat's nomination of dark horse John W. Davis. D. Mazmanian, Third Parties In Presidential Elections 56-63 (1974). An early filing deadline may serve to exclude precisely those third-party candidates, such as Petitioner Anderson, with substantial national support and a realistic chance of impacting the national campaign. *Cf. Note, Developments—Election Law*, 88 Harv. L. Rev. 1111, 1143 n.130 (1975).

37% in 1974.[11] The Court below, however, completely ignored the rights of this class of voters in its conclusion that "Ohio's laws do not impermissibly discriminate against independent candidates. . . ." Cert. App. 28a.

The Court of Appeals' conclusion appears to rest on two propositions. First, the Court asserted that independent and party candidates are "not so similar" because "[p]ersonal appeal is all [the independent] has to offer," *id.* at 26a, whereas the party candidate's appeal is an "amalgam" of his personal appeal and the party's appeal. *Id.* at 26a. Second, the court stressed that *parties* have important rights that independents lack "in being free to select the best candidate it can find to advance its view." *Id.*

The first of these propositions, relating to the source of a candidate's appeal, is not only empirically problematic and unsupported by the record, but is entirely irrelevant to the issue at hand. More fundamentally, both propositions ignore the source and nature of the rights asserted in this case. These are the First Amendment associational and voting rights of independent-minded and disaffected citizens in Ohio and across the nation who, dissatisfied with the major party nominees or programs, seek the opportunity to support a nationally-viable independent candidate for the nation's highest office. The Court of Appeals was simply erroneous in thinking that, while the interests of the established political parties were entitled to special protection, no comparable interests of those persons supporting independent candidates need be recognized.

While there are certainly differences between the group of voters who have drawn together to form or join an

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[11] N. Nie, S. Verba & J. Petrocik, *The Changing American Voter* 47, 346 (1976); W. E. Miller, A. H. Miller & E. J. Schneider, *American National Election Studies, Data Sourcebook*, 1952-78, Table 2.1, at 81 (1980). *See also*, W. E. Miller & T. Levitan, *Leadership and Change: The New Politics and the American Electorate* 35-37 (1976); P. Converse, "Change in the American Electorate," in *The Human Meaning of Social Change* 317-32 (1972).

ongoing political party, on the one hand, and those who seek in a particular election to promote an independent, this Court has recognized that each group—and its candidates—have a distinct and legitimate role in the electoral process. Indeed, in *Storer v. Brown*, the Court rejected the State's argument that restrictive ballot requirements for independent candidates could be justified by the availability of the "new political party" route to ballot access. The Court emphasized that:

> [T]he political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other. A new party organization contemplates a statewide, ongoing organization with distinctive political character. Its goal is typically to gain control of the machinery of state government by electing its candidates to public office. From the standpoint of a potential supporter, affiliation with the new party would mean giving up his ties with another party or sacrificing his own independent status, even though his possible interest in the new party centers around a particular candidate for a particular office. . . . [M]ore fundamentally, the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status. Must he necessarily choose the political party route if he wants to appear on the ballot in the general election? We think not.

415 U.S. at 745-46. Political parties are, fundamentally, associations of persons gathered together for political purposes. That independent voters do not wish to form an ongoing political organization does not deprive them of associational rights. Their rights—including the right to coalesce around an independent, third-force presidential candidacy as the election approaches—are no less infringed by the early filing deadline than would the rights of a political party be infringed if its ultimate nominee were barred from Ohio's general election ballot. The question, then, is whether the rights and interests of independent voters in the presidential election process

are so much less important than those of party voters as to justify the grossly differential treatment afforded them by Ohio's early filing deadline. We submit that this is precisely the type of difference in treatment vitally affecting fundamental rights that requires rigorous security under the Equal Protection clause.

The class of "independent-minded" voters, while representing a substantial portion of the electorate, is nonetheless still substantially outnumbered by the two major parties and their proponents. The dangers against which both the First Amendment and the Equal Protection clause were intended in some part to protect—that the majority might seek to perpetuate its political control by restricting access to the political process and opportunities for meaningful political expression by those who are less organized and lack political "clout"—are thus plainly presented by legislation that establishes substantially differing qualifications for the same office according to whether the candidates derive their support primarily from party voters or unaffiliated voters. *Cf. United States v. Carolene Products Co.*, 304 U.S. 144, 152-53, n.4 (1938); *see Williams v. Rhodes, supra*, 393 U.S. at 31. Indeed, the Court of Appeals' own reasoning makes clear the need for heightened scrutiny in such a case by noting that Ohio has advanced the state interest relied upon by the Court, i.e., voter education, "*to the extent that it can within the party system . . .*" Cert. App. 22a (emphasis supplied). In other words, state legislators, recognizing that the major party conventions are in late summer and that any attempt to set an earlier filing deadline for party candidates would prompt a confrontation with the national parties, have instead deferred to them for political reasons. But because *independent* voters do not constitute a strong, ongoing constituency between elections, the legislature is relatively free to act against candidates who may be supported by this group without fear of organized opposition or political reprisal.[12]

[12] A similar rationale, that the State had legislated "where it could," was soundly repudiated by Judge Gignoux in *Anderson v.*

C. Both Courts Below Correctly Concluded That The The "Reasonably Diligent Candidate" Test Is Not The Appropriate Standard Here.

Because Ohio's early filing deadline directly discriminates among Presidential candidates on grounds of political affiliation, and thus discriminatorily burdens the interests of independent-minded voters in Ohio and elsewhere, the District Court was plainly correct in concluding that the filing deadline could be sustained only if the classification which it draws can fairly be justified as necessary to promote a particular, compelling state interest. *Illinois State Board of Elections v. Socialist Workers Party*; *American Party v. White.* Ohio has repeatedly urged, however, that the only standard by which this filing deadline should be measured is what it refers to as the "reasonably diligent candidate" standard set forth in *Storer v. Brown* and *Mandel v. Bradley.* Both the District Court and Court of Appeals properly rejected this argument.

Both *Storer* and *Mandel* involved constitutional challenges to the signature requirements themselves—which both plaintiffs had tried, unsuccessfully, to meet within the statutory time periods.[13] As the Court below ex-

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Quinn, 495 F. Supp. 730, 733 (D. Me.), *aff'd*, 634 F.2d 616 (1st Cir. 1980) (per curiam), Cert. App. 97a.

[13] *Storer v. Brown* involved in part, a challenge to California's requirements that independent candidates gather and file signatures of 5% of the prior electoral vote within a 24-day period 60 days before the general election. In holding that the trial court had erred in dismissing this challenge, this Court noted that, on their face, California's requirements imposed a burden on the ability of an independent candidate to gain ballot access. 415 U.S. at 740. Applying the compelling interest standard articulated earlier in its opinion, *id.* at 729, 736, the Court concluded that the factual record was insufficiently developed to permit an appellate decision whether, in fact, the requirements were necessary to serve a compelling state interest. It emphasized that the issue on remand was whether "it is *essential* to demonstrate community support to gather signa-

plained, the "remand in *Mandel v. Bradley* with directions to determine whether a reasonably diligent candidate could satisfy the signature requirement indicates that, accepting the state's interest [in a showing of community support] as important, the means chosen to effectuate that interest nonetheless may not be too burdensome." Cert. App. 17a. The reasonably diligent candidate test, however, is irrelevant to the challenge presented here to the early decision which Ohio forces independent presidential candidates and their supporters, but not party candidates, to make. As the court below explained, while the

> reasonably diligent candidate test is peculiarly well-suited to weighing the burden imposed by collecting signatures before a given date or within a given time . . . [i]t is no help in assessing the importance of Ohio's interests in the filing deadline itself . . . . The hardships of a filing deadline, standing alone, are [that] a candidate is required to make up his mind at an early date whether to participate at all in an election several months hence, before the issues are

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tures of substantially more than 5% of the group from which the independent is permitted to solicit support." *Id.* at 744.

In *Mandel v. Bradley*, 432 U.S. 173 (1977), plaintiff—a would-be independent candidate for the Senate—had tried but failed to obtain the required number of signatures on nominating petitions by the filing deadline. Thus, there as in *Storer* this Court was called on to determine whether the petition signature requirements, in combination with particular time limitations for meeting those requirements, were so burdensome that they were not well-tailored to meet the interest advanced by the State in preventing frivolous candidacies by requiring independent candidates to demonstrate a modicum of community support. The Court held that such an inquiry is essentially factual: if a petition requirement cannot be met in the time periods specified by the State by a "reasonably diligent candidate," looking at such factors as the size of the pool from which signatures can be drawn as well as the time allowed in which to circulate petitions, then it cannot be sustained as "necessary" or "essential" to the State's concededly compelling interests in requiring a demonstration of community support. *Storer v. Brown, supra*, 415 U.S. at 740, 743-44.

> crystallized, the competition identified and support can be estimated. . . . [a] candidate's 'diligence' has little to do with the severity of this burden.

Id. Accord, Anderson v. Quinn, supra, 495 F. Supp. at 732 n.6, Cert. App. 96a; *Anderson v. Morris, supra*, 500 F. Supp. at 1099.[14]

We turn now to an examination of the interests advanced in support of Ohio's early filing deadline, and demonstrate that none of them is sufficient to justify its discriminatory burden on fundamental rights.

II. OHIO'S EARLY FILING DEADLINE CANNOT BE SUSTAINED EITHER BY THE INTERESTS CONSTRUCTED INDEPENDENTLY BY THE COURT OF APPEALS OR THOSE ACTUALLY ASSERTED BY THE STATE.

While this Court has recognized several compelling state interests that may justify regulating access to the ballot, it has also made clear that a statute that burdens First Amendment and voting rights must be "tied to a particularized legitimate purpose." *Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973); *Storer v. Brown*, 415 U.S. 724, 731 (1974). Moreover, the Court has emphasized that the validity of a challenged classification must be determined by reference to " 'the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.' " *Id.* at 730, *quoting Williams v. Rhodes, supra*, 393 U.S. at 30.

The Court below, however, declined to apply these standards. It ignored the two interests asserted by Respondent, namely, treating independent and party candi-

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[14] As the District Court below observed, if Ohio set a filing date in November of the year before the election but required only 100 signatures to be filed, any "reasonably diligent candidate" who made the decision to run that early would presumably be able to qualify, but this would not "preclude the Court from inquiring whether the State has a compelling state interest in requiring a potential candidate to commit himself so far in advance of the general election." Cert. App. 50a.

dates equally and promoting political stability by requiring candidates to make an early choice whether to run as independents. Nor did the Court below even allude to the legislative history of the filing deadline as part of a statutory scheme which had the purpose of excluding all but the major party nominees from Ohio's general election ballot. Instead, the Court of Appeals *sua sponte* developed an interest *it* concluded was important by hypothesizing that the deadline was intended to secure prolonged exposure of independent candidates for President to Ohio's electorate. As we show below, Ohio's early filing deadline cannot be sustained on any of these grounds.

A. The Early Filing Deadline Cannot Be Sustained As A Voter Education Measure.

1. *The Filing Deadline Does Not In Fact Promote Voter Education Goals.*

In apparent recognition that the interests advanced by the state would not sustain this filing deadline in view of the structure of Ohio law, the Court of Appeals undertook to "discern" for itself "whether a justification can be found for the law in question." Cert. App. 18a. The interest it concluded was sufficient to justify the deadline was that of ensuring that "voters making the important choice of their next president have the opportunity for a careful look at the candidates, a chance to see how they withstand the close scrutiny of a political campaign," Cert. App. 20. This interest has never been seriously advanced by the state in this litigation,[15] nor

[15] Even under "rational basis" scrutiny, this Court has generally required that the challenged classification further "some legitimate, *articulated* state purpose," *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17 (1973) (emphasis added), or "purposes *identified by the State*," *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (emphasis added). These decisions would *a fortiori* caution against sustaining a statute which discriminates against the exercise of fundamental rights on the basis of a rationale neither evident on the face of the legislation nor argued in its support by the State's counsel.

is there any evidence that Ohio's legislature intended to pursue such a general goal. The filing deadline, moreover, does not and could not achieve such a purpose.

First, because the filing deadline applies to only one small category of candidates, it is both grossly discriminatory and highly ineffective. Ohio does not require prospective candidates for major or minor party nominations to declare their candidacy in Ohio, come to Ohio, enter or run in Ohio's primaries, campaign in Ohio or have any other connection with the state whatsoever. As mentioned above, the parties are free to nominate in late summer and have placed on Ohio's ballot dark horse, compromise or late-emerging candidates as to whom the need for prolonged voter exposure is just as great. And any notion that Ohio has generally sought to advance this interest is readily belied by its failure to enact any measures to assure that all presidential candidates to be voted on in the general election are called to the attention of its own citizens over a long period of time.[16] Ohio leaves the decision entirely to the individual party candidate whether he or she wishes to participate in Ohio's presidential primary. *Cf. Dunn v. Blumstein*, 405 U.S. 330, 359-60 (1972) (failure to further "alleged interest in an informed electorate in a universally applicable way" is inconsistent with claimed interest).

Second, the filing requirement for independents does not serve the purpose of voter education even with respect to independent candidates themselves. The dead-

[16] Other states, by contrast, employ various mechanisms seemingly designed to encourage participation in their primaries by the broadest possible range of likely candidates. Some, for example, require the parties to designate a list of "all potential" candidates for the primary ballot. *See, e.g.*, Wis. Stat. tit. II, ch. 5-12 §§ 5.60, 8.12 (West 1981). In other states, a public official is affirmatively charged with compiling a list of primary contenders to include all "nationally recognized" or "generally advocated" candidates. *See e.g.*, Mich. Stat. Ann. §§ 6.1614, 6.1615 (Callaghan 1982); Conn. Gen. Stat. § 9-465(a) (1979); Mass. Ann. Laws ch. 53, § 70E (Michie/Law. Co-Op 1982).

line merely requires that the minimal number of signatures be submitted by a date certain. The supporters of a nationally-viable candidate may perform that function without the candidate ever coming to or campaigning in Ohio. Thus the deadline is ineffective in assuring that the voters of Ohio will "have the opportunity for a careful look at" the prospective independent candidate in February or March of an election year, much less that they will have "a chance to see how [the candidate will] withstand the close scrutiny of a political campaign." Cert. App. 20a. The reality is that the voters see how *all* candidates, both independent and partisan, withstand the rigors of the campaign when the campaign is actually conducted—in August, September and October of the election year. *See Dunn v. Blumstein*, *supra*, 405 U.S. at 359 (voter education occurs largely in month before election). Any minimal effect the deadline may have as a voter education measure is plainly outweighed by the burden it imposes on fundamental rights.[17]

Third, the concept of a filing deadline as a device to ensure early and prolonged voter interest in prospective candidates totally ignores the unique national nature of the presidential election process. The vast bulk of information available to a voter in any state about prospective presidential candidates (whether independent, minor or major party) is likely to be based on the activities, positions, speeches and campaigning of those candidates throughout the country.[18] Thus, the notion that

[17] *See, Salera v. Tucker*, *supra*, 399 F. Supp. at 1628 (any marginal increase in knowledgeable voting does not warrant burden of early filing date).

[18] The Court of Appeals' extraordinary assertion that modern communications "can only inform the electorate of the existence of a candidate," Cert. App. 21a, but can provide no further opportunity for evaluation, is wholly belied by the fact that the principal form of modern campaign exposure is through the mass media. *See* B. Rubin, *Media, Politics, and Democracy* 160 et seq. (1977) (elections turn on media presentations); D. Broder, *The Party's Over* 239 (1972) (television serves as chief bridge from candidate to voter).

Ohio's filing deadline does serve or was ever intended to serve as a voter education device in the presidential context is as unrealistic as it is hypothetical.

2. *The History Of Ohio's Filing Deadline Demonstrates That Its Actual Purpose Was Discriminatory.*

This Court has made it clear that it "need not in equal protection cases accept at face value assertions of legislative purposes, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 649 n.16 (1975); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Jimenez v. Weinberger*, 417 U.S. 628, 634 (1974). Particularly where important First Amendment and voting rights are at issue, this Court has engaged in a rigorous scrutiny of the actual purposes of the legislation as indicated by both its history and the degree to which the classification is in fact tailored to achieve the asserted goals. "When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." *Carey v. Brown*, 447 U.S. 455, 460-62 (1980). *See also Police Department of Chicago v. Mosley*, 408 U.S. 92, 98-99 (1972); *Mills v. Alabama*, 384 U.S. 214 (1966). The after-the-fact rationale developed by the Court of Appeals flies in the face of the historical evidence, previously canvassed in *Williams v. Rhodes*, *supra*, 393 U.S. at 25-28, which demonstrates the exclusionary purpose actually sought to be served by Ohio's filing deadline.

Prior to 1948, Ohio law—in accordance with that currently in effect in the vast majority states—permitted independent candidates for "state Office" to qualify for a place on the general election ballot by filing petitions

with a nominal number of signatures either sixty or ninety days prior to the *general* election.[19] In 1948, a group of electors for Henry Wallace tendered petitions to Ohio's Secretary of State, but he refused them on the ground that Ohio law made no specific provision for nomination of independent candidates for the office of presidential elector. In an ensuing mandamus action, *State ex rel Beck v. Hummel*, 150 Ohio St. 127, 80 N.E.2.d 899 (1948), the Ohio Supreme Court held that such candidates were entitled as candidates for "state office" to use the nominating procedures.

As both the three-judge lower court, and Justice Harlan of this Court found in *Williams v. Rhodes, supra*, Wallace's 1948 candidacy prompted new, restrictive legislation in the 1949-51 period that was not motivated by any legitimate state interest but rather had the purpose and effect of excluding from Ohio's ballot virtually everyone except candidates of the two major parties. For example, in 1949 the legislature removed from the law altogether the petition route for independent Presidential candidates. Amended Senate Bill No. 206 (1949), 123 Ohio Laws 380. And in 1951, the filing deadline for independent candidates for state and congressional offices was changed from ninety days before the *general* election to ninety days before the *primary* (which was at that time held in early May). Amended Substitute Senate

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[19] Senate Bill No. 373 (1891), 88 Ohio Laws 449 (*thirty* days before general election, 500 signatures); House Bill No. 429 (1913), 103 Ohio Laws 843 (changed deadline to sixty days); Amended Substitute Senate Bill No. 2 (1929), 113 Ohio Laws 307; Amended Substitute Senate Bill No. 109 (1947) 122 Ohio Laws 103 (changed deadline to ninety days prior to general election). Indeed, when the states first began regulating ballots in the 19th century, most provided for independent nominating petitions to be filed within the month preceding the general election, and many would not accept such petitions earlier than sixty days before election day. F. Dallinger, *Nominations for Elective Office in the United States*, Harvard Historical Studies, v. 4, 177-79 (1897); Mazmanian, *supra* note 10, at 91.

Bill No. 269 (1951), 124 Ohio Laws 673. This was the first time in Ohio history that the filing deadline for petitions had been keyed to the primary rather than to the general election.

When the constitutionality of Ohio's election laws was challenged by the Socialist Labor Party in 1968, the three-judge court that heard the challenge unanimously ruled that it was "an unreasonable requirement" that a petition "as an independent candidate must be filed ninety days before the primary election rather than ninety days before the general election." *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 989 (S.D. Ohio 1968). This Court, in affirming the District Court's ruling on the unconstitutionality of Ohio's laws, agreed and explicitly cited the early filing deadline as one of the features of a system the "totality" of which it condemned as an unconstitutional burden on the rights of third parties and their supporters. *Williams v. Rhodes*, *supra*, 393 U.S. at 26-27, 32-34. Three years later, in *Jenness v. Fortson*, this Court again specifically adverted to Ohio's deadline as being "unreasonably early." 403 U.S. 431, 438 (1971).[20]

Notwithstanding these unambiguous condemnations, Ohio's General Assembly has never substantially modified the early filing deadline. In a 1970 challenge brought by the Socialist Labor Party and two independent candidates, a three-judge court, agreeing that many of the specific challenged provisions were unconstitutional, observed that Ohio's "[post *Williams*] amendments to the election laws merely perpetuates the restrictive laws enacted between 1948 and 1952." *Socialist Labor Party v.*

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[20] *See also Whitley v. Williams*, 393 U.S. 544, 570 (1969) (changing time for filing nominating petition from 40 days before general to 60 days before primary elections "increas[ed] the difficulty for an independent candidate to gain a position on the general election ballot" and was subject to clearance under Voting Rights Act); *accord, Hadnott v. Amos*, 394 U.S. 358, 366 (1969).

Rhodes, 318 F. Supp. 1262, 1269 (S.D. Ohio 1970).[21] Following this decision, the General Assembly enacted a new Section 3513.257 governing petition nomination of independent candidates, but retained the old filing deadline of ninety days prior to the May primary; in 1974, when the legislature moved Ohio's primary date from May to early June, it moved the filing deadline to its current position on the 75th, rather than the 90th day prior to the primary.[22] As the District Court found, the early filing deadline remains virtually the last remnant of the original restrictive scheme. Cert. App. 34a.

The proposition that Ohio's early filing deadline for independent candidates serves *any* legitimate state interest is rebutted not only by the "facts and circumstances behind the law," *Storer v. Brown*, but by the fact that it is substantially out of line with the filing deadlines for independent Presidential candidates in all but one of the other states. A substantial majority of states (at least thirty-three and the District of Columbia) have filing deadlines for independent presidential candidates that fall in August [23] or September.[24] Virtually

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[21] As discussed *infra*, Part IV, the District Court never reached the issue of the constitutionality of the deadline for independent candidates in that case since the plaintiffs had undertaken no action to seek ballot access until long after the party candidates had been chosen in the primaries. 318 F. Supp. at 1273.

[22] Amended Senate Bill No. 460 (1971), 134 Ohio Laws 873; Amended Substitute House Bill No. 662 (1974), Pt. II, 135 Ohio Laws 784.

[23] Ala. Code § 17-19-2(b) (1975); Alaska Stat. § 15.30.025(a) (1976); D.C. Code Ann. § 1-1312(f) (1981); Fla. Stat. Ann. § 103.021(3) (West, Supp. 1982); Ill. Ann. Stat. ch. 46 § 10-6 (Smith-Hurd 1965 & Supp. 1981); La. Rev. Stat. Ann. § 18:465 (West 1977); Md. Laws ch. 446, Art. 33 § 7-1(b)(1)(II) (1982); Mo. Rev. Stat. § 115.329(1) (1980); Mont. Code Ann. § 13-10-504(1) (1979); Neb. Rev. Stat. § 32-504(1)(b) (Supp. 1981); Ore. Rev. Stat. § 249.722(1) (Supp. 1981); S.D. Codified Laws Ann. § 12-7-1 (Supp. 1981); Wash. Rev. Code Ann. §§ 29.18.030, 29.24.040(8) (Supp. 1981).

[24] Ariz. Rev. Stat. Ann. § 16-341(C) (1975 & Supp. 1981); Ark. Stat. Ann. § 3-207 (1976); Cal. [Elec.] Code § 6833 (Deering

all of the rest (eleven) fall in June [25] or July.[26] With the exception of Indiana, where the filing deadline was moved from September to February after the 1980 election,[27] Ohio's March 20 deadline is the earliest in the country by more than a month. The next earliest is that of New Jersey, which falls in the last week of April.[28] While other states' practices are not conclusive in this context, the overwhelming weight of the practices of other states tends to confirm that Ohio's early filing deadline is not in fact related to any important state interests but rather was intended to serve the exclusionary purpose revealed by its legislative history. *Williams v. Rhodes*, *supra*, 393 U.S. at 33, n.9.

1977); Colo. Rev. Stat. § 1-4-801(h) (1980); Conn. Gen. Stat. § 9-453i(1), (2) (Supp. 1980); Del. Code Ann. tit. 15, § 3002(b) (1981); Hawaii Rev. Stat. § 11-113(b)(2) (Supp. 1981); Iowa Code Ann. § 44.4 (West 1981); Ky. Rev. Stat. § 118.365(3), (4) (Supp. 1980); Minn. Stat. Ann. § 204B.09 (West Supp. 1980); Miss. Code Ann. § 23-5-134 (1981); Nev. Rev. Stat. § 298.109 (1981); N.M. Stat. Ann. § 1-8-52(C) (Supp. 1981); N.Y. [Elec. Law] § 6-158(9) (McKinney 1978); N.D. Cent. Code § 16.1-12-04 (1981); N.H. Rev. Stat. Ann. § 655:43 (1981); S.C. Code Ann. § 7-13-350 (Law Co-op. 1981); Tenn. Code Ann. § 2-5-101a (Supp. 1981); Va. Code § 24.1-159 (1980); Vt. Stat. Ann. tit. 17, § 2386 (1981); Wyo. Stat. § 22-5-307 (1977).

[25] Idaho Code § 34-708A (1981); Kan. Stat. Ann. § 25-305 (1973); Mass. Ann. Laws ch. 53 § 10 (Michie/Law. Co-op 1978 & Supp. 1982); N.C. Gen. Stat. § 163-122 (1976 & Supp. 1981); Pa. Stat. Ann. tit. 25, §§ 2913, 2953 (Purdon 1963 & Supp. 1981); R.I. Gen. Laws § 17-16-1 (1981); W. Va. Code § 3-5-24 (1979); Wis. Stat. Ann. § 8.20(8)(a) (West 1967 & Supp. 1981).

[26] Ga. Code Ann. § 21-2-132(d) (1981); Okla. Stat. Ann. tit. 26, § 10-101.1 (West Supp. 1981); Tex. Rev. Civ. Stat. art. 11.01(b)(2) (Vernon 1981). Only two states, in addition to Ohio, New Jersey (late April) and Indiana (see text) have deadlines earlier than June, and those are both in May. Mich. Stat. Ann. § 6.1685 (Callaghan 1972 & Supp. 1982); Utah Code Ann. § 20-3-38 (1976).

[27] Ind. Code Ann. § 3-1-11-1 (Burns 1982).

[28] N.J. Stat. Ann. § 19:13-9 (West 1964, Supp. 1981).

An examination of the interests which the State in fact asserted—and which the Court of Appeals rejected *sub silentio*—confirm the conclusion that this discriminatory filing deadline is simply not reasonably related to any legitimate, much less compelling, state interest.

B. The Interests Asserted By The State Below Cannot Sustain The Deadline.

In the courts below, Respondent advanced two state interests to justify the filing deadline, arguing that it treated party and independent candidates equally, and that it was intended to preserve the "political stability" of the state's electoral process. As discussed below, at various times Respondent has articulated several different versions of the latter claim. In fact, the filing deadline does not further and cannot be sustained by any of the various state interests asserted by the State, or by the more familiar justification of administrative necessity.

The most basic and legitimate reason for filing deadlines is the need of election officials for adequate time to verify petition signatures, resolve third-party challenges, and complete other necessary administrative tasks. *Cf., e.g., Salera v. Tucker*, 399 F. Supp. 1258 (E.D. Pa. 1975), *aff'd*, 424 U.S. 959 (1976). However, Respondent has never contended, nor could he, that Ohio's early deadline is justified by any administrative requirements since he stipulated in the District Court that no administrative tasks respecting the petitions are required or undertaken before mid-June. Jt. Stip. ¶ 21, Cert. App. 73a. The nominating petitions simply sit in his office awaiting the completion of the party primaries. Thus Ohio's legitimate administrative needs and its interest in assuring the integrity of the nominating petitions could support no filing deadline earlier than mid-June.

In the courts below, Respondent argued that Ohio's early filing deadline was justified as an attempt to treat all candidates equally, since the date on which independents must file petitions to obtain a place on the general election ballot is the same date on which

candidates wishing to run in party primaries must also file for the primary. Such a deadline arguably achieves a kind of "equality" in the case of local and statewide offices—where party candidates are acutally chosen in the primary and thereby achieve a place on the ballot at that time. In that context, all candidates who seek eventual general election ballot access must declare at the same time. But in the presidential context, the equality argument is simply irrational. Requiring independent presidential candidates to qualify fully for the general election ballot in November at the same time that party presidential candidates may choose to enter a June presidential primary that has no necessary relationship to whether they eventually appear on Ohio's general election ballot, simply is not equal treatment.

The other interest advanced by Respondent below to sustain the statute was the state's interest in promoting "political stability," an interest which this Court has previously recognized as sufficient to sustain a disaffiliation clause applicable to nonpresidential offices. *See Storer v. Brown*, discussed *infra*, pp. 35-38. The District Court in this case recognized *Storer's* holding that a state has "a legitimate and compelling interest in maintaining the stability of its political processes," Cert. App. 54a, but found after detailed analysis that Ohio's filing deadline did not and could not serve such a state interest, particularly in the context of Ohio's entire complex of ballot access laws. Cert. App. 54a-56a.[29]

The state's original argument was that the filing deadline served as a so-called "sore loser" device, preventing a party candidate who runs in the party primary and loses from thereafter qualifying as an independent candidate for the same office in the general election. But

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[29] Similar political stability arguments were unanimously rejected, for reasons virtually identical to those relied upon by the District Court here, in *Anderson v. Quinn*, *supra*, 495 F. Supp. at 733; *Anderson v. Morris*, *supra*, 636 F.2d at 57-58; *Anderson v. Hooper*, *supra*, 498 F. Supp. at 905.

the Ohio legislature has acted directly in this field by enacting a "sore loser" statute designed expressly to prevent a party candidate from running as an independent if he loses a primary, Ohio Rev. Code Ann. § 3513.04 (Page 1981), and has also specifically provided that a *presidential* candidate may *withdraw* from the presidential primary up to thirty days beforehand, *id.* § 3513.30. Petitioner Anderson met this requirement by withdrawing from Ohio's primary in timely fashion, and the State thus conceded that Ohio's sore loser statute did not bar him from the ballot. Jt. Stip. ¶ 7, Cert. App. 68a.[30] Ohio's attempt to justify the filing deadline as an additional device to serve "sore loser" interests thus suffers from the same defect found in Illinois' effort to justify a more rigorous signature requirement for city than for state-wide office, *Illinois State Board, supra*, 440 U.S. at 186: that in each case, the State legislature itself created a more direct, effective and narrowly tailored device to achieve its stated end. *See also, Dunn v. Blumstein, supra*, 405 U.S. at 348.

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[30] The state sought to salvage its point by arguing that the filing deadline was actually intended to work "in tandem" with Ohio's sore loser provision as part of a comprehensive "sore loser" scheme. The lynchpin of the argument was the assertion that the sore loser statute itself applied only to nonpartisan offices and write-in candidates (not covered by the early filing deadline), and the filing deadline was intended to serve (in effect) as a sore loser provision as to all other offices. Memorandum In Support Of Defendant's Motion For Summary Judgment in the District Court, pp. 32-35. However, Petitioners demonstrated in their reply brief in the District Court that the state's interpretation of its sore loser provision was inconsistent not only with its plain language but also with every Ohio state court decision and Attorney General opinion on the subject. Moreover, Ohio's sore loser statute was enacted in 1923, House Bill No. 564 (1923), 110 Ohio Laws 131, at a time when the filing deadline was keyed to the general election and over one-quarter of a century before it was first moved to a date prior to the primary. Plaintiffs' Reply Brief in the District Court, pp. 13-14. At oral argument, the state virtually abandoned its claim relating to this alleged state interest, and the District Court rejected the argument with little discussion. Cert. App. 55a-56a.

After abandoning the "sore loser" argument, Respondent asserted that the early filing deadline served the same purposes as the "disaffiliation" clause upheld in *Storer*, barring any but "true" independents from appearing on Ohio's general election ballot as such. The filing deadline involved here does not, however, serve that function. On the one hand, it does not assure that candidates recently affiliated with a party (or even *still* affiliated with a party) do not run as independents, since it permits a registered Republican or Democrat to appear as an independent candidate so long as he files his nominating petitions by March 20. Indeed, as the District Court pointed out, "Anderson apparently could run in the other 49 states as a Republican, and RC 3513.257 would not bar him from running as an independent in Ohio so long as he filed here as such by March 20." Cert. App. 54a. On the other hand, the deadline totally precludes *all* prospective independent candidates—including the most nonpartisan members of this class—from a place on the general election ballot if they do not file by the deadline, regardless of previous purity from party affiliation. An early filing deadline thus bears no logical relationship to the character of the candidate as a true independent or to the interests which *Storer* held justified California's one-year disaffiliation provision.[31] As a purported mechanism to promote political stability by assuring true independence, then, the filing deadline is both overbroad and under-inclusive. As the District Court correctly found, it functions as a disaffiliation provision, if at all, "only by mere happenstance, not by any reasonably discernible legislative design." Cert. App. 55a.

On appeal, the State once again modified its rationale, arguing that this filing deadline was generally intended to promote political stability by assuring the exclusive-

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[31] The same "disaffiliation" rationale for an early filing deadline was cogently treated, and rejected, by Judge Gignoux in *Anderson v. Quinn, supra*, Cert. App. 99a. *See also Anderson v. Morris, supra*, Cert. App. 104a, 105a.

ness of different routes to the ballot. But looked at in light of this claim, the filing deadline is so "riddled with exceptions" that it could not reasonably be regarded as satisfying that aim. *Eisenstadt v. Baird*, 405 U.S. 438, 449 (1972). For example, the filing deadline would not have barred an independent candidate who missed the March 20 deadline from appearing on Ohio's November election ballot if he received a minor party nomination and was certified to the Secretary of State as its candidate up to 75 days before the general election. Ohio Rev. Code Ann. § 3505.10 (Page 1981). Nor does the filing deadline preclude a candidate from successfully petitioning prior to March 20 to appear on Ohio's general election ballot as an independent, but subsequently appearing on that ballot as the partisan nominee of either a major or minor party. Indeed, under Ohio law, there is no prohibition on a candidate simultaneously filing a nominating petition to appear as both an independent and partisan candidate for office.[32]

In short, none of the versions of the "political stability" argument asserted by the State below articulates any state interest that was intended to be served, or in practice is served by the filing deadline.

C. The Political Stability Interests Articulated In The *Storer* Decision Cannot Justify Ohio's Deadline Because Of The Deadline's Discriminatory Nature And Because Of The Unique National Character Of The Process For Selecting Presidential Nominees.

Both courts below were plainly correct in rejecting Respondent's shifting efforts to shelter the application of Ohio's early filing deadline to independent presiden-

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[32] *Cf. State ex rel. Donnelly v. Green*, 106 Ohio App. 61, 148 N.E. 2d 519 (1958) (candidate filing two petitions for inconsistent office could, if timely, withdraw one and be certified to the ballot for the other).

tial candidates under the rubric of this Court's decision in *Storer v. Brown, supra.* This Court there upheld a one-year party disaffiliation provision which barred two would-be congressional candidates from running as independents. Applying the "compelling interest" standard because of its recognition that the disaffiliation bar imposed substantial burdens on the candidates and their supporters, the Court nonetheless upheld the rule, emphasizing that it served the state's generally expressed and compelling interest in avoiding shifts in affiliation and "involv[ed] no discrimination against independents" since party candidates were subject to even more stringent disaffiliation rules. 415 U.S. at 733-34. Here, by contrast, Ohio's filing deadline bars only independent, and not partisan presidential candidates; thus it is "discriminatory" and not a neutral provision expressive of general state policy.

Moreover, the Court found that the disaffiliation provision in *Storer* was justified as serving a clear, compelling and "general policy of requiring the resolution of intra-party disputes through the primary." As the Court wrote,

> The direct party primary in California is not merely an exercise or warm-up for the general election but an integral part of the entire election process . . . by which the people choose their public officers. It functions to winnow out and finally reject all but the chosen candidates.

Id. at 736. But in the nationwide process leading to the election of a President, any given state primary plays a far less important role than does a primary election for statewide or local office. In local elections, the primary is a necessary first step for all aspiring party candidates, and the winners of the primary are the party candidates who will appear on the general election ballot. *Cf. United States v. Classic,* 313 U.S. 299 (1941); *Smith* v. *Allwright,* 321 U.S. 649 (1944). The same is simply not true in presidential primaries. Many states have no primary for this office, and the purpose of those that

exist is to select delegates to a national party convention at which, in many cases, the delegates are not even bound to the candidates on whose behalf they were chosen. Presidential primaries, then, have no necessary, integral or binding relationship to the selection of the ultimate party nominee. They are, in short, simply a "warm-up"—not even for the general election, but for a party convention at which delegates, some bound to vote for the winners of their state's primary, some not, gather together in late summer to select the party's nominee. Indeed, this Court noted last Term, "[a]ny connection between the process of selecting electors and the means by which political party members in a State associate to elect delegates to party nominating conventions is so remote and tenuous as to be wholly without constitutional significance." *Democratic Party of the United States v. Wisconsin*, 450 U.S. 107, 125 n.31 (1981).

The very limited role each state primary plays in this overall process demonstrates the correctness of the District Court's conclusion here that:

> [T]he defendant has not been persuasive that the compelling state interest which the Supreme Court found in the context of a statewide election in Part I of *Storer* is equally compelling in an election for the national office of President . . . . Thus when the defendant argues that the burden placed on Congressman Anderson by R.C. 3513.257 is minimal compared to the one-year disaffiliation requirement exacted by California, he strains to force a national peg into a state hole.

And the Court of Appeals appeared to agree that a state's interest in excluding candidates from its ballot to further political stability is necessarily diminished in the context of the national process for selecting presidential nominees. Cert. App. 5a n.2. *Cf.* 42 U.S.C. § 1973aa-1 (durational residency rules of more than 30 days invalid in presidential elections).

In sum, both Respondent and the Court of Appeals have striven mightily at various stages of this litigation to

identify one or another legitimate, nondiscriminatory state interests that might be put forward to sustain the filing deadline. None of the interests cited in fact are furthered or could rationally be furthered by the provision in any way that does not burden the fundamental rights at stake in a grossly overbroad manner. Hence, regardless of the appropriate standard of review to be applied, the deadline cannot withstand constitutional scrutiny.

III. OHIO'S EARLY FILING DEADLINE IS INCONSISTENT WITH THE NATIONAL PRESIDENTIAL SELECTION PROCESS AND IS NOT A PROPER EXERCISE OF THE STATE'S AUTHORITY UNDER ARTICLE II, § 1.

The Presidential election is unique. Alone among our public officials, only the President and Vice President are elected by all the people, concentrating "power . . . in a single head in whose choice the whole nation has a part." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 653 (1952) (Jackson, J. concurring). Only in the Presidential election are the voters of each state inextricably bound to the voters of every other state in the determination of a single nationwide outcome. Indeed, the "vital process of choosing Presidential and Vice Presidential candidates," and of then electing these officers, necessarily "involves coalitions cutting across state lines." *Cousins v. Wigoda*, 419 U.S. 477, 490 (1975) (footnote omitted). Ohio's premature bar to independent candidacies controls not only its own voters' relationship to this national process, but those of voters across the nation as well.

Whatever latitude a state may have to implement its own policies in regulating the process by which its own officials and representatives to the Federal Government are elected, the situation is necessarily different in a national presidential election where each state's regulation works not to shape its own electoral process but rather, in combination with the several states, to shape

the process by which all the states together select a President and Vice-President. As this Court has itself noted, there is a "pervasive national interest in the [selection] of candidates for national office, . . ." which "is greater than any interest of an individual State." *Cousins v. Wigoda, supra,* 419 U.S. at 490.[33]

In Article II, the Framers of the Constitution recognized the unique nature of the presidential selection process, and sought to limit the extent to which any one, or a few, states could interfere with the "pervasive national interest." Nothing in the compromise struck by the Framers can be read to authorize a single state arbitrarily to disqualify a significant class of candidates, some seven months before the uniform national election date set by the Congress, from competing for that State's electors.

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[33] Where the relationship between any one state's primary and the overall electoral process is so tenuous, the state's interest in promoting its own norms of political stability through exclusionary ballot access rules relating to the primary is not only of diminished importance but is, in practice, likely to be wholly ineffective. No one state is in a position, through its own actions, to assure political compromise and stability in the national parties, or of national politics generally. *Cf. Burroughs v. United States,* 290 U.S. 534, 544-45 (1934) (upholding congressional regulation of presidential elections in "situations which, if not beyond the power of the state to deal with at all, are beyond its power to deal with adequately.") Indeed, the assertion of state authority to restrict ballot access in order to influence such national political affairs must be viewed skeptically, at best. *Cf. Nyquist v. Mauclet,* 432 U.S. 1, 9-10 (1977) (encouraging aliens to become naturalized "is not a permissible [purpose] for a State"). For example, any state interest in assuring that most elections are won by a clear majority or plurality so as to avoid the necessity of runoffs has little or no applicability in Presidential elections in view of the electoral college procedure mandated by Constitution. A failure to achieve majority in any one state will have no necessary impact on the outcome in the electoral college and will in any event not require a runoff election in view of the procedure mandated by the Twelfth Amendment for congressional resolution of a less than majority vote in the electoral college.

Article II confers upon the state legislatures full discretion over the "manner" in which Presidential electors are to be chosen. But, recognizing the need to prevent a few powerful states from exerting undue influence in selecting the best possible candidates for the President, the Constitutional Convention directed that the *time* for the State's exercise of their designated means of choosing electors, and for the electors to then exercise their constitutional function of selecting the best presidential candidate, should be chosen by the national Congress and should be uniform.[34]

The Framers devoted considerable energies towards creating a presidential election method that would minimize the dangers of "cabal." [35] By this, the Framers re-

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[34] Article II, § 1 provides:

> Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: . . . .
>
> The Congress may determine the Time of chusing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

For a summary of the history of Article II, § 1, see M. Farrand, *The Framing of the Constitution of the United States*, Ch. XI (1913).

[35] 1 *Records of the Federal Convention of 1787*, 80 (M. Ferrand ed. 1966) (hereinafter RECORDS). Concern about cabal was expressed most frequently in discussions of an election of the President by the House of Representatives, but was also mentioned in the context of a general election, 2 RECORDS at 58 (Mr. Williamson, of North Carolina; special electors selected by people subject to "undue influence" if in office six to eight months). "Cabal" was particularly feared in reference to larger states combining to the detriment of the small ones. 2 RECORDS at 30 (Mr. Pinkney, of South Carolina) (did not expect question of election by people to arise again given as it was to most serious objection; "[t]he most populous States by combining in favor of the same individual will be able to carry their points); 2 RECORDS at 110-11 (Mr. Madison, of Virginia) (election by populace susceptible of dis-

ferred to their concern that the election of the people's President not be in the hands of the few, be they individuals or states.[36] One of the means chosen to achieve this end was the reservation to Congress of control over the timing of electors' appointment and of the presidential election itself; the uniform election date, in particular, together with the requirement that the electors meet separately, was thought likely to minimize the practical opportunity for undue influence on the selection process by a few states or electors to the detriment of the whole.[37] And Congress' early experience with the exercise of its power to choose a uniform date for appointing electors appeared to confirm the Convention's fears that, absent such restriction, this would likely occur.[38] Indeed, in the debate on the first law requiring that all states select the presidential electors on one day, Congress accepted the need for each state to "harmonize" its laws and

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advantage to smaller states, while election by State Executives also subject to intrigues of candidates and Ministers of foreign powers); *id.* at 111 (Mr. Elseworth, of Connecticut) (largest States would invariably have their man).

[36] 2 RECORDS 513, 515 (ultimate decision in Senate will lead to aristocracy); 1 RECORDS 80 (greater confidence of people if President elected by people, not States); 2 RECORDS 30 (populous states may override will of small states). *See* note 35, *supra*.

[37] Upon presenting the plan ultimately adopted, Mr. Govr. Morris stated that the unity in time of election and separation in place would avoid the evils of "cabal" and make it "impossible also to corrupt them." 2 RECORDS at 500. He thought "the principal advantage aimed at was that of taking away the opportunity for cabal." *Id.* at 501. The other delegates echoed these thoughts. 2 RECORDS 500 (Mr. Butler, North Carolina). See also III J. Story, Commentaries on the Constitution of the United States § 1450, at 314 (1833).

[38] In 1792, Congress first exercised its power to regulate the time of choosing electors, providing both that the Electors should cast their votes for President on the first Wednesday in December and that they should be appointed by the States within the 34 days preceding that date. Act of March 1, 1792, ch. 8, 1 Stat. 239. In

practices to the new uniform date in light of the greater national interest.[39]

In view of this history, Ohio's early filing deadline cannot be justified as an acceptable incident of the State's constitutional authority under Article II to determine the "manner" by which electors would be selected. As the Convention's debates demonstrate, the Framers' understanding of the choices left to the states was that they would determine whether the people's choice would be expressed through popular election, state legislative selection, statewide or district selection, or some combination thereof. This is confirmed by this Court's comprehensive review of the scope of the "manner" clause in *McPherson v. Blacker*, 146 U.S. 1 (1982). In upholding Michigan's decision to elect presidential electors by district, instead of at large, the court there noted the diversity of selection methods used in the early days of the Republic by the

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the early 1840's, however, several smaller states requested Congress to specify one single date on which the state electors would be chosen, complaining that the longer period of time permitted the practice of "pipelaying"—the practice of paying voters to cross state lines (in one instance, by boat from Indiana to Ohio), to illicitly cast their votes for particular candidates. Cong. Globe, 28th Cong., 1st Sess., 303, 349-50 (1844). Over the objections of South Carolina, such legislation was enacted. Act of Jan. 23, 1845, ch. 1, 5 Stat. 721. To this day, Congress continues to require a uniform day for the selection of electors. 3 U.S.C. § 1 (1970).

[39] In response to concerns that a change in the date would force State legislatures to change their meeting time, Rep. Hamlin (Me.) stated: "It was to be regretted that the bill before the House, if it should become a law, should incommode any State. Yet its great importance should overcome all minor considerations, and the great good designed should insure its passage. Each State would judge for itself whether its laws would apply, and *whether any and what State legislation would be necessary to make the one law harmonize fully with the other.*" Cong. Globe, 28th Cong., 1st Sess. 435 app. (1845) (emphasis added).

diverse states to choose electors, in accordance with the Constitutional Convention's decision to "[leave] it to the state legislatures to appoint directly by joint ballot or concurrent separate action, or through popular election by districts or by general ticket, or as otherwise might be directed." 146 U.S. at 28. Here, however, Ohio has virtually conceded that the filing deadline is unrelated to its decision as to the manner by which independent presidential candidates must qualify for the ballot, *e.g.*, by nominating petition, since it does not process the petitions until three months after they are filed. While the Constitution certainly does not require uniformity of state regulation, it just as surely does not contemplate that, more than seven months before the date set by Congress, a single state could intentionally exclude from the deliberations of its Presidential electors, or of the body which appoints such electors (here, the people of Ohio), a nationally-recognized and qualified candidate for that office.

Because Ohio's filing deadline is so out of line with those of other states, and with the date set by Congress for the selection of electors, it undermines the national presidential election process and makes way for the very evil the Framers and Congress sought to prevent. It permits one state to wield undue influence in the nationwide selection process—influence out of proportion to its number of electoral votes—for, by limiting its slate of independent presidential candidates several months in advance of the rest of the states, Ohio in effect gives those candidates who qualify a special blessing, while handicapping those who do not, when the voters outside of Ohio consider who they will support.

In order to demonstrate the problem, consider if three other large states with interests aligned with Ohio—for instance, Pennsylvania, New York and California—adopted a similar, but not discriminatory, deadline that required party and independent candidates alike to de-

clare in those states prior to March 20 in order to obtain access to their general election ballots. Such laws, in these four states alone,[40] presumably would as a practical matter have deterred the major parties from nominating such candidates as Hubert Humphrey, Dwight Eisenhower and Adlai Stevenson, none of whom were declared candidates on March 20—and of course would have barred them from these states' ballots, if nominated. The result—exclusion of a category of serious presidential candidates by a cabal made up of a handful of powerful states—would surely be condemned by the founding fathers, and Congress, as one that the uniform time for selection of electors, and for their voting, sought to avoid.

Although the Framers' original expectations about how the presidential selection process was likely to work in practice have been modified by the advent of party politics, the unique national character of the process is little changed, and the concerns of the Framers as to selection by the whole electorate rather than by a few powerful states retain vitality today. If Ohio's early deadline is sustained as a valid exercise of state power under Article II, the way is open for a few states to thwart the constitutional balance struck by the Framers and to undo the benefits sought to be served by it. The provisions of Article II do not support this result; to the contrary, they, together with other express prohibitions in the Constitution, forbid it.

IV. THE DECISION BELOW REFLECTS A SERIOUS MISUNDERSTANDING OF THE REACH OF A SUMMARY AFFIRMANCE BY THIS COURT.

The Court below concluded, at the outset of its opinion, that Petitioners' challenge to the Ohio early filing deadline for independent presidential candidates was con-

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[40] In 1980, there were 538 electoral votes, so 270 votes constituted a majority. Half of that number is 135 votes. In 1980, Ohio (25), New York (41), California (45) and Pennsylvania (27) accounted for a total of 138 electoral votes. *The World Almanac Book of Facts 1982* (1981).

trolled by this Court's summary disposition of appeals in *Sweetenham v. Rhodes*, 318 F. Supp. 1262 (S.D. Ohio 1970), *aff'd sub. nom. Sweetenham v. Gilligan*, 409 U.S. 942 (1972), and *Pratt v. Begley*, 352 F. Supp. 328 (E.D. Ky. 1970), *aff'd*, 409 U.S. 943 (1972). At the same time, however, the Court recognized that this was a "slender reed" on which to rest sole reliance for its decision reversing the judgment of the District Court. Cert. App. 12a. The Court of Appeals' hesitancy was well-founded for, while paying lip service to settled principles limiting the reach of this Court's summary affirmances, the Court below had to set aside those principles and fashion an unprecedented theory of its own relating to the *time* when this Court announced its decisions in the *Sweetenham* and *Pratt* cases in order to conclude that they were dispositive of Petitioners' challenge here. In so doing, it completely distorted the precedential effect of summary affirmances.

This Court has made clear that "summary dispositions . . . extend only to the 'precise issues presented and necessarily decided by those actions,'" *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 499 (1981), *quoting Mandel v. Bradley, supra*, 432 U.S. at 176. Thus, "[t]he precedential significance of the summary action . . . is to be assessed in the light of all of the facts in the case." *Mandel v. Bradley*, 432 U.S. at 177. Indeed, this Court has had occasion more than once in dealing with ballot access decisions and the lower courts' reading thereof to emphasize that "[a] summary disposition affirms only the judgment of the court below . . . and no more may be read into [the Court's action] than was essential to sustain that judgment." *Illinois State Board of Elections v. Socialist Workers Party, supra*, 440 U.S. at 182-83.

Proper application of these principles to the facts of the *Sweetenham* and *Pratt* cases compels the conclusion that the Court of Appeals erred in holding the summary affirmances in those cases controlling here. Plaintiffs in *Sweetenham* were independent candidates for Senator

and Governor. They challenged then-existing provisions of Ohio law requiring them to file nominating petitions in early February, ninety days prior to the May 1970 primary election. This was the same date on which all party candidates seeking to run in a primary were also required to file. Neither plaintiff, however, had taken *any* steps toward qualifying as an independent candidate prior to the May primary; indeed, the first date on which either reported any progress in complying with the nominating procedures was late June, almost two months after the party candidates had already been selected in the primaries. 318 F. Supp. at 1273.

In its opinion, the three-judge court never considered the validity of the February filing deadline. Rather, after noting that the State could reasonably require all candidates to declare on or before a certain date, the court denied relief on the equitable ground that plaintiffs "had not taken steps to become candidates prior to the May 1970 primary election." 318 F. Supp. at 1273. The court itself explicitly framed its holding in these terms:

> The Court holds that plaintiffs Sweetenham and Stapleton, who did not officially declare their candidacy at or before the time Ohio requires political parties to choose their nominees, are not entitled to ballot position.

Id. Thus, as the District Court below in this case correctly perceived, the lower court in *Sweetenham* "never reached the constitutional issue [of the filing deadline's validity] and certainly did not decide it." Cert. App. 57a n.9.

Plaintiff in *Pratt*, an independent candidate for the U.S. House of Representatives, was required under Kentucky law to submit a nominating petition fifty-five days before the May 26 primary, or March 31. As in *Sweetenham*, this was the same time at which all primary candidates were also required to file. Plaintiff did not tender his petition until August 12. The lower court, while purporting to decide (by a 2-1 vote) the reason-

ableness of the filing deadline on the ground that it simply required "all potential candidates, whether Democrat, Republican or Independent, to file for nomination on the same date," also indicated that its dismissal of plaintiff's complaint was based at least in part upon plaintiff's failure to make timely efforts to qualify as a candidate, leaving the court only "several days" to decide the validity of the legislative enactment. 352 F. Supp. at 330.[41] In both cases, then, equitable relief was denied at least in part because the plaintiffs had been so tardy that they were not equitably entitled to relief. Since a summary affirmance affirms only the judgment below, and not necessarily the reasoning, the summary affirmances of these cases should extend no further than required by the very limited facts presented.

More significantly, neither *Sweetenham* nor *Pratt* presented the issue posed in this case, where the early primary filing deadline is applied to an independent presidential contender. In the presidential context, the party opponents of the independent candidate need not declare their candidacy or file for the primary election at all in order to appear on Ohio's general election ballot; nor are the identities of the party candidates determined at the time of the primary, as in the case of statewide offices. Indeed, the very state policy endorsed by the lower courts in *Sweetenham* and *Pratt*—that of requiring all candidates seeking eventual general election ballot access to declare officially at the same time—is inimical to the early filing deadline for independent *presidential* candidates challenged by petitioners here. Hence, it is clear that those decisions could not have dispositively barred the action taken by the District Court in this case

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[41] Moreover, so far as the reported decision indicates, the complaint was dismissed without any judgment being entered for the State in favor of the constitutionality of the statute. This was also the case in *Sweetenham*, 318 F. Supp. at 1274, so that in neither case was any order adjudging the filing deadline to be constitutional entered by the District Court or placed before this Court on appeal.

invalidating the March 20 filing deadline as applied to independent presidential candidates. *Cf. Illinois State Board of Elections v. Socialist Workers Party, supra,* 440 U.S. at 181-83.

Nonetheless, the Court of Appeals held that because this Court acted to resolve the appeals in *Sweetenham* and *Pratt* subsequent to the November 1970 election, rather than before, a much broader interpretation should be placed on what this Court intended by its summary action. The Court of Appeals reasoned as follows:

> Had the Supreme Court affirmed *Pratt* and *Sweetenham* before the November 1970 elections, the precedential effect of its action would pretty clearly be limited to a determination that equity did not demand that plaintiffs in those cases have a place on the ballot in view of their late filing. However, the Supreme Court did not affirm until almost two years after the 1970 elections. At that time, any claim for equitable relief and any decision based on the equities asserted by these parties was long since mooted. Therefore, the only purpose we can find to the court's action in 1972 was to settle the constitutionality of Ohio's and Kentucky's filing deadlines for future elections.

Cert. App. 10a. The Court below thus appears to have believed that this Court, had it wished to avoid reaching out to decide constitutional issues not directly presented by the judgments below in those cases, should have declined to entertain the appeals—as if this Court had some discretionary jurisdiction over appeals brought before it, akin to its authority in certiorari cases. In fact, however, the only judgments before this Court, and the only judgments affirmed by it, were those entered by the district courts in the two cases. Neither of those judgments purported to declare the constitutionality of the filing deadlines against all challenge. Even if they had, neither case presented the issue involved in the instant case. And in both cases there was a substantial basis for concluding that the particular plaintiffs were

not entitled to equitable relief because of their failure to act until well after the primaries had been held and the party candidates selected.[42]

CONCLUSION

For all the foregoing reasons, Petitioners respectfully submit that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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[42] In the Court of Appeals, respondent argued that this Court's summary affirmance in *Sweetenham* must have resolved the constitutionality of Ohio's February filing deadline challenged by plaintiffs in that case because their Jurisdictional Statement in this Court specifically raised First and Fourteenth Amendment challenges to the filing deadline. The Court below correctly rejected this argument, noting that a summary affirmance by this Court does not decide "every issue raised in the jurisdictional statement," but rather signifies that "on the narrow facts before the Court the issues raised in the jurisdictional statement [do] not warrant the relief sought." Cert. App. 10a. The Court below also properly observed that "[t]o hold otherwise would permit parties appealing cases to the Supreme Court to control the precedential effect of a summary action by the way they structure their jurisdictional statement." *Id.*

Respondent's Brief

Office - Supreme Court, U.S.
FILED
SEP 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1635

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN B. ANDERSON, et al.,

Petitioners,

—v.—

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of the State of Ohio,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE

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—v.—

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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Petitioner John B. Anderson, on June 8, 1979, seventeen months in advance of the election, announced his intention to seek the Republican nomination for President of the United States (A.73a).[1] At that time, he was a Republican member of the United States House of Representatives. He had been elected to that office as a Republican every two years since 1960. The only other office he ever held, that of Winnebago County (Illinois) State's Attorney, he also held as a Republican. He had never sought elective office as a member of any other political party or as an independent (A. 73a).

Petitioner mounted a national campaign to secure the Republican nomination for President. Thirty-six states held primary elections to elect delegates to the Republican National Convention. Petitioner arranged to have his name appear on the ballot as a Republican candidate for President in twenty-seven of those states, including Ohio (A.73a). During his campaign for the Republican nomination, he raised over $6.6 million, including nearly $2.7 million in federal matching funds (A.70a).

By April 24, 1980, petitioner had actually been on the ballot in nine Republican presidential primaries without winning a single one (A.73a). Of the five hundred thirty-five delegates to the Republican National Convention awarded to candidates by that date, only fifty-five had been awarded to petitioner (A.73a). Over half of his delegates were from his home state of Illinois. Even in that state, he had lost the election by a substantial margin and received only twenty-eight percent of the state's delegates (A.73a). In two of the nine states, Georgia and Florida, petitioner had attracted as little as nine percent of the Republican vote (A.70a).

Both courts below found that petitioner did not have the support to become the Republican nominee. The District Court stated (A.38a) that "Anderson's losses in each of the Republican primaries he entered prior to April 24 indicate quite clearly he did not enjoy support from a majority of the Republican Party." The Court of Appeals added (A.2a) that "[t]he results of these nine primaries showed that Anderson's attempt to become the Republican party nominee was doomed to failure."

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1 References to "(A.__)" are to the appropriate pages in the Appendices to the Petition for Certiorari. References to "(J.A.__)" are to the appropriate pages in the Joint Appendix.

Therefore, on April 24, 1980, petitioner abandoned his attempt to seek the Republican nomination and announced that he would be an independent candidate for President (A.68a). He was careful to state, however, that even though he was to become an independent candidate, he would remain a member of the Republican Party (A.68a). Petitioner's decision to abandon the Republican presidential primary method of seeking the presidency was so untimely that his name nonetheless appeared on the Republican presidential primary ballot in twelve states and the District of Columbia even after he announced his decision on April 24, 1980 (A.74a). His name was removed from the Republican presidential primary ballot in only five states (including Ohio).

On May 16, 1980, petitioner tendered his nominating petition, containing approximately 14,500 signatures, and his statement of candidacy as an "independent" to respondent Anthony J. Celebrezze, Jr., the Secretary of State of Ohio (A.69a). Respondent refused to accept them on the ground that they were not timely filed. Ohio Rev. Code Ann. § 3513.257 (Page 1981) required that an independent candidate's statement of candidacy and petition be filed by the seventy-fifth day before the first Tuesday after the first Monday in June, or March 20, 1980.

Had petitioner not initially chosen to utilize the political party primary system for seeking the presidency in Ohio, it is beyond dispute that he would have had no difficulty in filing by March 20, 1980, the required 5,000 signatures of registered voters on nominating petitions for an independent candidacy. Indeed, when petitioner belatedly made his decision to run as an "independent" in Ohio, he gathered 16,000 signatures, more than three times the number required, in only five days (A.74a). The 5,000 signatures required to be filed represents a mere .12% of the 4,111,873 votes cast in Ohio in the 1976 presidential election (A.76a).

Ohio provides alternative routes to the ballot for presidential candidates. Candidates who wish to run as independents are required to comply with the petition requirements outlined above. Candidates who choose to attempt to obtain the nomination of a political party by seeking delegates to the national convention have to authorize in writing their delegates to file, by the same date as independent candidates, a declaration of candidacy and nominating petitions bearing the signatures of a thousand qualified electors for at-large delegates and one hundred fifty signatures for delegates

from each Congressional District. Signers must be members of the candidate's political party. Ohio Rev. Code Ann. §§ 3513.05, 3513.12 and 3513.151 (Page 1981).

Independent candidates for President who satisfy the filing requirements are automatically entitled to a place on the ballot in the general election. In Ohio, such candidates are able to do so with regularity (A.75a-76a). In addition to petitioner, five independent candidates for President appeared on the ballot in 1980, as did two independent candidates for the United States Senate. In 1976 there were five independent candidates for President and three independent candidates for the United States Senate. Two independent candidates for the United States Senate appeared on the ballot in Ohio in 1974. In addition, independent candidates for governor appeared on the Ohio ballot in both 1974 and 1978.

The ease with which independent candidates have qualified for the Ohio ballot is a consequence of the relatively lenient requirements in contrast to those more stringent requirements nevertheless found permissible by this Court for other states. The signature requirement is very low, and signatures may be gathered during an unlimited period of time with no geographic restrictions. Petition signers need not be unaffiliated with political parties.

Partisan candidates for President, on the other hand, can only appear on the ballot if they are selected by their political parties. A political party earns the right to select its candidate by complying with the provisions of Ohio Rev. Code Ann. § 3517.01 (Page 1981). Parties that obtained at least five percent of the vote in the last gubernatorial or presidential election are automatically entitled to a place on the ballot. A new party or one which did not obtain the required percent of the vote must file, one hundred twenty days before the primary election, petitions bearing the signatures of qualified electors equal in number to one percent of the electors who voted in the last gubernatorial or presidential election.

On May 19, 1980, petitioner instituted this action in the United States District Court for the Southern District of Ohio, claiming that the filing deadline violated the First and Fourteenth Amendments. Also named as plaintiffs in the action were a presidential elector pledged to petitioner and voters from Ohio and New Jersey who supported petitioner.[2] The District Court held that the filing

2 These persons are also petitioners herein. The word "petitioner" is used throughout this brief to refer to petitioners collectively or to Anderson individually, as the context indicates.

deadline was unconstitutional and ordered that petitioner's name be placed on the ballot. It found that the deadline substantially burdened First Amendment rights and invidiously discriminated against independent candidates since political parties were not required to name their candidates until after their nominating conventions.

Petitioner appeared on the ballot in Ohio and in every other state. He received approximately seven percent of the vote nationally.

The Court of Appeals reversed. It found that the District Court had placed too heavy a burden upon Ohio in defending its filing deadline. It found that the filing deadline for independent candidates posed minimal burdens at most upon such candidates and need not be justified by compelling interests. It found that the filing deadline furthered the legitimate state interests of providing the voters with an opportunity for a careful look at the candidates and helping them make an informed choice about where to allocate their support. The Court of Appeals found no invidious discrimination against independent candidates, holding that Ohio's laws simply reflected in a permissible manner the differences between independent candidates and political parties. Alternatively on the First Amendment question, the Court of Appeals found that summary affirmances by this Court in prior cases disposed of the issue as to whether a March filing deadline violated the First Amendment.

SUMMARY OF ARGUMENT

Ohio is specifically authorized to promulgate a filing deadline for independent candidates for President by U.S. Const. art. II, § 1, cl. 2, which authorizes state legislatures to determine the manner of selection of presidential electors. The states have extensive power under this provision, and it is limited only if its exercise is expressly prohibited in other provisions of the Constitution. *Williams* v. *Rhodes*, 393 U.S. 23 (1968). In determining whether a ballot access regulation, such as a filing deadline, is expressly prohibited by either the First Amendment or the Equal Protection Clause, the courts are required to look carefully at the severity of the burden imposed upon constitutional rights. If the extent of the burden is unclear, the courts must examine the effect of the regulation as a factual matter and determine the burden. If a plaintiff establishes that a substantial burden is imposed, such as total deprivation of the right to vote or seek office for a class of persons, the regulation will fall unless it

is supported by compelling state interests, a strict scrutiny approach. If the burden is not substantial, as in this case, the regulation is presumptively constitutional and will be upheld as long as it is rationally related to any legitimate state interests which may be conceived.

Ohio's filing deadline for independent candidates imposes only minimal burdens, at most, upon the exercise of First Amendment rights. Any burden must be measured by determining effects upon the class of independent candidates as a whole, not simply the effect upon petitioner who failed to meet the deadline because he had chosen to seek the Republican nomination for President in Ohio instead. The filing deadline has had no adverse effect upon the class of independent candidates in Ohio. Other provisions of Ohio law regulating independent candidacies are very lenient compared to those in other states, and independent candidates have qualified for the ballot with regularity in Ohio since the deadline was established in 1974. Five independent candidates for President were on the Ohio ballot in 1976 and five in 1980. Although regulation of a candidate's access to the ballot affects his supporters also in that the candidate's failure to qualify limits the candidates available to the voter, the Court has never found this sufficient in and of itself to constitute a substantial burden upon First Amendment rights. Petitioner was simply faced with a time limitation for determining what kind of candidacy to pursue, and such a time limitation does not constitute the substantial intrusion upon associational freedoms which would justify the application of strict scrutiny to the filing deadline. *Rosario* v. *Rockefeller,* 410 U.S. 752 (1973).

Nor does the filing deadline invidiously discriminate against independent candidates in violation of the Equal Protection Clause. Independent candidates are required to file on the same day as partisan candidates seeking Ohio delegates to the national conventions. It is the political parties which have the right of access to the general election ballot in Ohio, not persons seeking political party nomination. Therefore, independent candidates must be compared to political parties in determining whether invidious discrimination exists since these are the entities established by statute which have access to the ballot. Yet political parties must qualify for ballot position earlier than independent candidates since they must either attract significant support in the preceding election or file a petition with a substantial number of signatures in February. Moreover, they

must do more than independent candidates after March in order to qualify for the ballot. They must select convention delegates in primary elections and then hold nominating conventions.

Even if independent candidates are compared to persons seeking party nomination, there is no invidious discrimination. Due to reforms in the party rules governing delegate selection and the increase in the number of presidential primaries in recent years, the vast majority of, indeed nearly all, partisan candidates have found it necessary to seek convention delegates in the primaries. Such candidates must authorize their slates of delegates in Ohio at the same time as independent candidates file their petitions, and the filing burdens are equivalent. To base a finding of discrimination upon the unrealistic and hypothetical possibility that a party candidate will emerge during the convention is not proper, especially given the much greater likelihood of discrimination if the independent candidate were allowed to file at the time of the conventions by circulating a petition, whereas the party candidates would be faced with the limiting situation created when the delegates were committed during the spring primaries.

If the filing deadline must be justified at all, and arguably it need not be since it burdens no constitutional rights, it is sufficient if the Court can conceive of any legitimate state interests to which it is rationally related. *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969). Since the filing deadline serves the function of identifying independent candidates and partisan candidates seeking Ohio convention delegates to the voters at the same time, it is rationally related to voter education. Such identification enables the voter to pay attention to the speeches and publications of those persons who are seeking the office of President and then make his decision as to whether to vote in the primary or contribute financial or other support with essentially all his options before him. Joint filing deadlines for independent candidates and partisan candidates seeking delegates also prevent a partisan candidate who is losing in the middle of the primary election campaign, as was petitioner, from abandoning the losing political party campaign and seeking to carry his differences with fellow party members to the general election ballot by running as an independent. This intra-party feuding can damage a state political party by causing party workers and financial support to work to the benefit of a candidacy outside the party, as happened with petitioner, and the state has

legitimate interests in preventing this. *Storer* v. *Brown,* 415 U.S. 724 (1974). The foregoing interests, so far as petitioner is concerned, are also compelling interests since the filing deadline was not overly restrictive as to petitioner in serving these interests.

Alternatively as to the First Amendment issue, the Court of Appeals properly followed the summary affirmances of this Court in *Sweetenham* v. *Gilligan,* 409 U.S. 942 (1972), and *Pratt* v. *Begley,* 409 U.S. 943 (1972), in determining that a March filing deadline did not violate the First Amendment. Both of the District Court decisions being affirmed clearly reached the merits of the constitutional questions, and the Court must have done the same in affirming after the elections at a time when any issue of equities would have been moot.

ARGUMENT

I.

A STATE STATUTE ESTABLISHING A FILING DEADLINE OF SEVEN AND ONE-HALF MONTHS IN ADVANCE OF THE ELECTION FOR INDEPENDENT CANDIDATES FOR THE OFFICE OF PRESIDENT OF THE UNITED STATES DOES NOT SEVERELY BURDEN FIRST AND FOURTEENTH AMENDMENT RIGHTS SUCH THAT IT IS INVALID UNLESS COMPELLING STATE INTERESTS ARE SHOWN.

A. The Constitution Specifically Commits To The States The Power To Determine The Manner In Which Presidential Electors Are Selected.

U.S. Const. art. II, § 1, cl. 2, provides that presidential electors shall be appointed by each state "in such Manner as the Legislature thereof may direct." This Court has consistently held that this provision grants extensive power to the states to pass laws regulating the selection of presidential electors. Thus, a presidential elector is not an officer of the United States such that the federal courts would have exclusive jurisdiction over the offense of unlawfully voting in a presidential election. *In re Green,* 134 U.S. 377 (1890). Also, a state might require a pledge from its presidential elector to support the nominees of his party's national convention in the exercise of the state's power to regulate the manner of appointment of electors. *Ray* v. *Blair,* 343 U.S. 214 (1952).

In upholding the power of the State of Michigan to provide for the election of presidential electors by Congressional Districts rather than in the state at large, *McPherson* v. *Blacker,* 146 U.S. 1 (1892), this Court referred to the extent of this power reserved to the states:

> The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.

Id. at 27.

> [I]t is seen that from the formation of the government until now the practical construction of the clause has conceded plenary power to the state legislatures in the matter of the appointment of electors.

Id. at 35.

> In short, the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States.

Id. at 35.

In recognizing the extensive nature of this power granted to the states to regulate the selection of presidential electors, the Court has held that it is limited only in that it could not be exercised to impose burdens "expressly prohibited in other constitutional provisions." *Williams* v. *Rhodes,* 393 U.S. 23, 29 (1968).

If U.S. Const. art. II, § 1, cl. 2, says nothing else, it certainly supports the proposition that the states have broad authority to establish ballot access regulations for presidential electors, and it certainly does not require that these regulations be justified by "compelling" state interests or, indeed, be explained in any way. It is for these reasons that the Court of Appeals below found that "[t]hat fact and the extent of the power the Constitution grants to the states to choose presidential electors counsel us to give a good deal of deference to the date that Ohio has selected" (A.22a-23a).

Ignoring the admonition of *Williams* v. *Rhodes, supra,* that this clause grants "extensive" power to the states to regulate the selec-

tion of presidential electors, unless such regulation is "expressly prohibited" elsewhere in the Constitution, petitioner argues (Pet. Br. 38-44) without benefit of citation to cases that the clause does not allow the states to determine the time candidates must file declarations to seek the office of presidential elector. Petitioner reaches this conclusion, in an argument never presented to either court below, because of a fear that a "cabal" of states could otherwise prevent the political parties from selecting late-emerging candidates such as Hubert Humphrey or Dwight Eisenhower at their national conventions by requiring that all candidates file declarations by March in order to obtain access to the general election ballot. However, in the same breath petitioner acknowledges that this Court has held that the clause does not even require the popular election of presidential electors and that the state might choose to allow their selection by state legislatures, as was once done in some states. *McPherson* v. *Blacker, supra.* The conceded power to allow selection by state legislatures would work far greater changes upon the process of selection than would the power to fix a filing deadline. It is unlikely that independent candidates for President would fare very well before state legislatures composed of members of major political parties.

B. The Court of Appeals Was Not Required To Utilize As Its Standard Of Review The "Compelling State Interest" Test.

Petitioner argues vigorously that the Court of Appeals employed an improper standard of review below in upholding the constitutionality of Ohio's filing deadline for independent candidates. The Court of Appeals found that "[u]nder the Constitution and the Supreme Court's ballot access cases it is the courts' duty to discern whether a justification can be found for the law in question" (A.18a). It went on to note that "[l]esser burdens can be justified by lesser interests" (A.18a). The Court of Appeals then found that the burdens imposed upon independents by Ohio's filing deadline were minimal and that the statute would be upheld if it rationally furthered legitimate state interests. It refused to place the burden upon Ohio of establishing compelling state interests and found that "the District Court required Ohio to prove too much" (A.18a).

Contrary to petitioner's assertions, the Court of Appeals analysis of this case is consistent with a long line of decisions from this

Court in ballot access and voting rights cases commencing with the leading case of *Williams* v. *Rhodes, supra.* The principles derived from these cases, discussed below, are as follows. The courts are always required to look carefully at the severity of the burden imposed upon constitutional rights by election regulations. If the extent of the burden on First and Fourteenth Amendment rights is unclear, the courts must examine the effect of the regulation as a factual matter and determine the burden. If there is a substantial burden on First or Fourteenth Amendment rights, such as total deprivation of the right to vote or seek office for a class of persons or substantial discrimination between classes of persons, the regulation will fall unless it is supported by compelling state interests, a strict scrutiny approach. If the burden is not substantial, the regulation will be upheld as long as it is rationally related to any legitimate state interests which may be conceived.

In *Williams* v. *Rhodes, supra,* this Court was presented with state statutes which prohibited independent candidacies and made it "virtually impossible" for third political parties to have their candidates placed on the presidential ballot. 393 U.S. at 24-25. New political parties had to obtain petitions signed by qualified electors totalling fifteen percent of the number of ballots cast in the preceding gubernatorial election, and signers could not have voted before. In addition, the new party had to have a convention consisting of delegates who had not voted in another party's primary. The Court found these restrictions to be "very severe," "highly restrictive," and to have "immediate and crippling impact" on basic constitutional rights. 393 U.S. at 32-3. Where these restrictions operated to limit elections to the two major political parties, the Court found the state would have to justify such restrictions by showing "compelling interests," and none existed. Such strict scrutiny was employed because third parties were virtually prohibited from appearing on the ballot.

The following spring, the Court considered whether not extending the right to vote by absentee ballot to persons being held in jail pending criminal trial violated the Equal Protection Clause. *McDonald* v. *Board of Election Commissioners of Chicago,* 394 U.S. 802 (1969). The Court indicated that it "must determine initially how stringent a standard to use in evaluating the classifications made [in the Illinois law] and whether the distinctions must be justified by a compelling state interest . . . ." *Id.* at 806. The Court

held it proper to employ instead the traditional test of whether the classifications bear a "rational relationship to a legitimate state end" because the absentee ballot provisions did not result in the plaintiff class being "absolutely prohibited from exercising the franchise." *Id.* at 809. There was nothing to show other means of voting were not provided jail inmates. *Id.* at 808.

Two months later, in *Kramer* v. *Union Free School District,* 395 U.S. 621 (1969), the Court had occasion to examine New York's statutes which limited voters in school district elections in certain rural areas to persons who either owned or leased taxable property or were parents or guardians of school children. The Court examined at some length the burden imposed by the statute. It found six classes of people who were completely excluded from voting in school district elections. *Id.* at 630. The Court again employed the compelling state interest test, finding that the statute should receive a "close and exacting examination" because it *denied* the franchise to citizens who were otherwise qualified by residence and age to vote. *Id.* at 626. Again, as in *Williams,* strict scrutiny was employed because a state statute totally prohibited certain classes of persons from exercising constitutional rights. In similar cases in the next several months, the Court again employed strict scrutiny to invalidate state statutes which prohibited certain classes of voters from voting at all in certain kinds of elections. *Cipriano* v. *City of Houma,* 395 U.S. 701 (1969) [invalidated statute limiting voting on issuance of revenue bonds to property taxpayers]; *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970) [applied *Cipriano* to election on issuance of general obligation bonds]; *Evans* v. *Cornman,* 398 U.S. 419 (1970) [invalidated Maryland law prohibiting persons resident in a federal enclave from voting].

In *Jenness* v. *Fortson,* 403 U.S. 431 (1971), the Court was presented with a statutory scheme for regulating ballot access which did not operate to totally prohibit certain classes of candidacies. At issue was a requirement that independent candidates file a petition with the number of signatures equal to five percent of the persons who voted in the last election for the office in question. The Court noted that the statutory scheme in Georgia was "vastly different" from the one before the Court in the *Williams* case. *Id.* at 438. The Court noted that the record established that candidates in Georgia had in fact gained the ballot by the nominating petition route. It also determined that the fairly high signature requirement was

"balanced" by the fact that any registered voter was eligible to sign the nominating petition. *Id.* at 439. Under these circumstances, where independent candidates were not absolutely barred from the ballot and had in fact qualified in the past, the Court upheld the Georgia signature requirement without any strict scrutiny or requirement that compelling interests be shown. Georgia was not required to demonstrate that its signature requirements, higher than those in many other states, represented the least drastic means of serving its interest in a candidate demonstrating community support.

A year later, the Court was confronted with a Texas law which required candidates to finance the cost of primary elections by paying extremely high filing fees (up to $8900). *Bullock* v. *Carter,* 405 U.S. 134 (1972). In determining whether this law violated the Equal Protection Clause, the Court first posed the threshold question of whether the statute must "be shown to have some rational basis, or whether it must withstand a more rigid standard of review." *Id.* at 142. The Court noted that the simple fact that the statute posed some barriers to ballot access did not necessarily require close scrutiny. Instead, the extent and nature of the statute's impact must be examined to determine the appropriate standard.

> Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose. The existence of such barriers does not of itself compel close scrutiny . . . . In approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters.

Id. at 143.

The Court then found that the filing fee system had a "patently exclusionary character" and that many potential office seekers were in a practical sense precluded from seeking nomination. Because of this "real and appreciable impact on the exercise of the franchise," the Court found that the laws must be closely scrutinized. *Id.* at 143-4. Again, the Court employed strict scrutiny only when the ballot access regulation was determined as a factual matter to exclude large numbers of candidates from the ballot.

That same year, in *Dunn* v. *Blumstein,* 405 U.S. 330 (1972), the Court was confronted with a Tennessee law which required a one-year residency in the state and a three-month residency in a

particular county in order to register to vote. In sustaining an equal protection challenge, the Court noted that "[s]uch laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote." *Id.* at 334-5. The Court had in other cases determined that the right to travel was a fundamental constitutional right and it noted that 3.3% of the national population travelled interstate to establish new homes in the years 1947-1970. Under circumstances where there was a total prohibition upon voting by a class of persons and a substantial burden on the constitutional right to travel, the Court found that compelling state interests must be shown to justify the restriction, and there were none.

In contrast, when only a fifty-day residency was required for voting registration, the Court upheld the state statutes while employing the less restrictive standard of review of "amply justifiable legislative judgment." *Marston* v. *Lewis*, 410 U.S. 679, 681 (1973); *Burns* v. *Fortson*, 410 U.S. 686, 687 (1973). These three voting residency cases support respondent's thesis that the compelling state interest test is to be employed only if the ballot access regulation is found as a factual matter to severely burden constitutional rights.

In *Rosario* v. *Rockefeller*, 410 U.S. 752 (1973), the Court was confronted with another situation where the election regulation did not totally deny rights to the class of voters in question. New York law required enrollment in a political party thirty days before the general election in order to vote in the next political party primary election eight to eleven months later. The Court in upholding the law distinguished earlier voting rights cases as ones in which "the State totally denied the electoral franchise to a particular class of residents, and there was no way in which the members of that class could have made themselves eligible to vote." *Id.* at 757. Under circumstances very similar to those in the instant case, the Court noted that the New York law "did not constitute a ban on their freedom of association, but merely a time limitation on when they had to act in order to participate in their chosen party's next primary." *Id.* at 758. The Court did not employ strict scrutiny in examining the statute and simply determined whether it was supported by "a legitimate and valid state goal." *Id.* at 761. This is the standard of review employed by the Court of Appeals below, and it is appropriate given the fact that petitioner and other independent candidates were not prohibited from appearing on the presidential

ballot in Ohio but were simply faced with a time limitation within which they had to act in order to appear on the ballot.

Later that year, in *Kusper* v. *Pontikes,* 414 U.S. 51 (1973), the Court invalidated an Illinois statute which prohibited a person from voting in one party's primary election if he had voted in another party's election within the preceding twenty-three months. Since this statute did absolutely prohibit the Illinois voter from voting in the next primary election if he had decided to switch his party affiliation, the Court found that it did substantially restrict the voter's First Amendment rights, unlike in *Rosario* where the voter could switch parties without skipping any primary election. Although *Kusper* was certainly distinguishable from *Rosario* upon this basis, the dissenting justices objected to employing a standard of strict review to a state statute which only "lightly brushes upon the right to vote and the right of association." 414 U.S. at 62-3 (J. Blackmun, dissenting).

The companion cases of *Storer* v. *Brown,* 415 U.S. 724 (1974), and *American Party of Texas* v. *White,* 415 U.S. 767 (1974), present situations where the Court has employed both the strict scrutiny standard of review and the less restrictive standard of review within the same case to differing ballot access regulations. In *Storer,* the Court applied the compelling state interest test to a California statute which barred the independent candidacy of any person who had been affiliated with a qualified political party within the preceding year. This restriction was described as "an absolute bar to candidacy." 415 U.S. at 737. Similarly, in *American Party,* the strict standard of review was applied to Texas statutes which were found to be "substantial burdens on the right to associate" because they imposed elaborate burdens upon minor political parties in qualifying for the general election ballot. 415 U.S. at 780. In both cases, the state statutes were nevertheless upheld.

On the other hand, when the Court in *Storer* was faced with a petition signature requirement for an independent candidate for President, the burden of which could not be determined on the face of the record, the Court did not simply employ a strict scrutiny test because it was a ballot access regulation. Instead, it remanded the matter with the direction to the lower court to determine whether a "reasonably diligent independent candidate" could be expected to satisfy the signature requirements or whether it would be "only rarely that the unaffiliated candidate will succeed in getting on the

ballot." 415 U.S. at 742. The Court found that "to assess realistically whether the law imposes excessively burdensome requirements upon independent candidates it is necessary to know other critical facts which do not appear from the evidentiary record in this case." 415 U.S. at 738. Thus, the compelling state interest test is not to be employed by the courts simply as a Pavlovian response to the fact that the state statute regulates a candidate's access to the ballot. The courts must inquire as to "the nature, extent, and likely impact" of the state statute. 415 U.S. at 738.

Such an inquiry was made in Part III of the *American Party* case. The Court did not apply the compelling state interest test to the Texas requirement that an independent candidate file petitions containing varying numbers of signatures [up to five percent of the vote at the last election for local offices]. The Court held simply that there was a "failure of proof" that this signature requirement for independents was "unduly burdensome." 415 U.S. 788-791.

In a third case decided with *Storer* and *American Party,* the Court in *Lubin* v. *Panish,* 415 U.S. 709 (1974), invalidated a filing fee for candidates without employing a strict scrutiny test. The Court simply found that the filing fee was "not reasonably necessary to the accomplishment of the State's legitimate election interests" because such fees had no relationship to the genuineness of a candidacy or the extent of voter support, and there were other means available to eliminate frivolous candidacies. *Id.* at 717-18. In not employing the strict scrutiny test from the earlier filing fee case, *Bullock* v. *Carter, supra,* the Court distinguished that case because the fees at issue in *Bullock* were "patently exclusionary." 415 U.S. at 715 n. 4. The much lower filing fees at issue in *Lubin* were only "exclusionary as to some aspirants." 415 U.S. at 718.

In *Cousins* v. *Wigoda,* 419 U.S. 477 (1975), at issue were Illinois statutes which operated to bar totally the seating of delegates selected by the Democratic National Party's credentials committee at its convention consistent with its own regulations which operated to prohibit seating the delegation elected pursuant to Illinois law. The Court in refusing to enforce the Illinois statutes applied the compelling state interests test, but it was again a situation where the state statutes in question would have completely prohibited the exercise of the Democratic Party's associational rights to select its convention delegates. It was noted that enforcement of the Illinois law "was as direct and severe an infringement of the right of

association as can be conceived," and the Illinois law was referred to as a "flat prohibition" and a "total restriction" on the party's right to assemble and associate. *Id.* at 491-2 (J. Rehnquist concurring).

Two years later in a case very similar to the one at bar, the Court in *Mandel* v. *Bradley,* 432 U.S. 173 (1977), refused to affirm a lower court determination that a March 8, 1976, filing deadline in Maryland for independent candidates violated the First Amendment. It held that the lower court was required to "undertake an independent examination of the merits" to determine whether a reasonably diligent independent candidate would have any difficulty in complying with the law. The lower court was criticized for not making findings "as to the difficulty of obtaining signatures in time to meet the early filing deadline" and for not looking at the past experience of independent candidates in meeting this filing deadline in that state. *Id.* at 177-8. Again, it is clear that the compelling interests standard of review does not come into play irrespective of the burdens imposed by a ballot access statute.

The compelling state interest standard of review was mentioned by this Court in *Illinois State Bd. of Elections* v. *Socialist Workers Party,* 440 U.S. 173 (1979), in which an Illinois statute was held invalid which required that an independent candidate obtain more petition signatures to run for office in Chicago than one would need to run for statewide office. However, this was a case of open and blatant discrimination between classes of candidates for which no intelligible justification was even offered by the state.

Last year, this Court employed the compelling interest test in determining that Wisconsin statutes violated the Democratic Party's First Amendment rights because they prevented the party from enforcing its rule that only publicly affiliated Democrats participate in the process of selecting delegates to the national convention. *Democratic Party of the United States* v. *LaFollette,* 450 U.S. 107 (1981). Application of a strict standard of review was appropriate because the Wisconsin statutes totally abrogated the Democratic Party rule by allowing persons who were not members of the Democratic Party to vote in the presidential preference primary and bind convention delegates to the results of that primary. The Court referred to the open primary statutes as working a "substantial intrusion into the associational freedom of members of the National Party." *Id.* at 125-6. It is only where such a substantial intrusion can be shown that application of strict scrutiny is appropriate.

Finally and most recently, the Court held in *Clements* v. *Fashing*, 102 S.Ct. 2836 (U.S. June 25, 1982), that state interests were "sufficient to warrant the *de minimus* interference with appellees' interests in candidacy" in the face of a First Amendment challenge to provisions of the Texas Constitution which restricted the candidacies of persons already holding public office. *Id.* at 2848. The Court referenced those portions of its decision on the Equal Protection Clause issue in which these state interests were required to meet only the traditional rational basis test in defeating the claim of invidious discrimination.[3] No showing of compelling state interests was required because the burden on First Amendment rights was "so insignificant." *Id.* at 2848.

Moreover, the plurality opinion suggested a further limitation on application of the strict scrutiny standard of review. Strict scrutiny may be justified only where classes of candidates have been excluded from the electoral process for reasons of either wealth or burden imposed because of status as a new political party or an independent candidate. *Id.* at 2844. Although the case at bar does involve an independent candidate, that *class* of candidates is not "excluded" from the ballot or burdened in achieving access to the ballot in Ohio, as argued *infra*. Contrary to the assertions of petitioner (Pet. Br. 12-13), the Court did not find the traditional equal protection analysis inappropriate in *all* cases involving independent candidates. It simply noted that strict scrutiny had historically been employed in two lines of cases, one of which involved independent candidates. Once a case falls within one of those two lines, the Court must still determine "the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process." *Id.* at 2844. In one of the cases cited by the Court as illustrative of the line of cases, *Jenness* v. *Fortson, supra,* strict scrutiny was not employed at all.

No less than ten of the foregoing cases involved situations where this Court declined to apply the strict scrutiny "compelling interest" test to state statutes which regulate ballot access or voter rights. The Court did so under circumstances where it had not been established that the state statute severely burdened a class of candidates or voters or totally excluded it from participation in the election. In

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3 The portions of the main opinion, joined by four Justices, which determine the Equal Protection Clause issue represent a plurality only, Justice Stevens simply concurring in the judgment with respect to this issue.

other words, there was no absolute deprivation of the constitutional rights in question. The Court's holdings in election law cases are consistent with its refusal in non-election law cases to employ strict scrutiny where there is no absolute deprivation of the constitutional right, even if it is a "fundamental" right. *See San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 35-39 (1973); *Sosna* v. *Iowa,* 419 U.S. 393, 405-6 (1975); Laurence H. Tribe, *American Constitutional Law,* pp. 1005-6 (1978); Note, *Strict Scrutiny and Rodriguez: Relative Versus Absolute Deprivation,* 9 Sw.U.L.Rev. 217, 221-224 (1979). Thus, the Court of Appeals in determining the appropriate standard of review held consistently with a long line of decisions from this Court in stating that "[l]esser burdens can be justified by lesser interests" (A.18a).

C. Ohio's Filing Deadline Imposes, At Most, Minimal Burdens Upon An Independent Presidential Candidate's Access To The Ballot, And There Is No Barrier To The Exercise of First Amendment Rights.

It is only if the Ohio filing deadline for independent candidates is found to severely burden such candidates' First Amendment rights by depriving that class of candidates of ballot position that it need be justified by a showing of compelling interests. Petitioner argues (Pet. Br. 13-14) that the filing deadline is severely burdensome simply because a candidate who does not decide to run by March fails to qualify. However, if that were the appropriate criterion for determining burden, then compelling interests would have to be shown in all election law cases since the plaintiff is invariably someone who has failed to comply with the provision at issue.

Indeed, the Court has always determined the burden in election cases by objectively looking at the *class* of candidates affected and not by simply looking at the individual plaintiff, and petitioner acknowledges (Pet. Br.10), and so pleaded in his complaint (J.A. 12-13), that the class in question is independent candidates for President, not independent candidates for President who cannot decide which route to the ballot to take until after March. Thus, in *Dunn* v. *Blumstein,* supra, 405 U.S. at 334-5, the Court pointed out that the statute divided residents into two classes and discriminated against one of the classes by "totally denying" the entire class the opportunity to vote. Moreover, there would have been no reason for the remands in *Storer* v. *Brown, supra,* and *Mandel* v. *Bradley,*

supra, if burden could be measured by its effects on plaintiffs alone since plaintiffs in those cases had failed to qualify for the ballot. The Court of Appeals recognized this below by stating that "the underlying rationale of the 'reasonably diligent candidate' test of *Mandel* v. *Bradley, supra,* and *Storer* v. *Brown, supra,* is that the burden of ballot access laws is not assessed solely from the perspective of the excluded candidate" (A.23a).

Recognizing the futility of trying to establish the imposition of any significant burden upon the class of independent candidates simply by showing the effect of the filing deadline upon petitioner himself, petitioner expends great effort in arguing that the filing deadline burdens "independent-minded voters" (Pet.Br. 14-19). It is, of course, true that "laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock* v. *Carter, supra,* 405 U.S. at 143. However, the Court has never required strict scrutiny in defense of an elections statute simply because the statute had the effect of limiting the choice of candidates available to the voter. Strict scrutiny has been required only when the class of voters has been prohibited from voting *at all. See Kramer* v. *Union Free School District, supra,* and related cases discussed *supra; Dunn* v. *Blumstein, supra.* The Court based its finding in *Bullock* v. *Carter, supra,* 405 U.S. at 144, that the extremely high candidate filing fees left "voters substantially limited in their choice of candidates" upon the fact that "many" potential candidates were precluded from seeking office. *Id.* at 143. Petitioner has made no showing that Ohio's filing deadline excludes "many" independent candidates. To the contrary, the Record establishes (A.75a-76a) that "independent-minded" voters in Ohio have had many independent candidates for President to choose from during the two presidential elections since enactment of the filing deadline.

The Ohio filing deadline does not, as petitioner argues (Pet.Br.14), bar all independent-minded voters from gathering behind any independent candidate after March. They may "gather behind" any independent who has complied with the filing deadline—as many have. Such voters are limited only in that they cannot support a *particular* candidate who may have decided to seek office too late. In such respects, "independent-minded" voters are in no different a situation than voters who may wish to coalesce around a particular member of a political party who makes his decision at the

national convention to seek nomination because of the "late emergence of issues." Such voters also are limited because the party candidate is selected by delegates chosen in the spring primaries—not by voters in the summer. Political party voters must also "gather behind" party candidates in the spring during the primaries.

Finally, petitioner argues that Ohio's filing deadline is severely burdensome because it was earlier than that in all but a handful of states in 1980. There is no doubt that Ohio's filing deadline was substantially earlier than that in many other states.[4] However, committing to the states in U.S. Const. art. II, § 1, cl. 2, the power to regulate the manner of selection of presidential electors by definition establishes a system whereby regulation will vary from state to state. Moreover, Ohio's ballot access laws for independent candidates are much more lenient in many respects than ballot access laws in other states which have been upheld by the Court.

Ohio requires only five thousand signatures on petitions for an independent candidate for President. This represents only about .12% of the total vote—4,111,873—cast in Ohio in the 1976 presidential contest (A. 76a). This is certainly a much smaller signature requirement than Georgia's 5% upheld by the Court in *Jenness* v. *Fortson, supra.* Furthermore, Ohio does not prohibit persons voting in a partisan primary election from signing a petition for an independent candidate although such a limitation was permissible in California. *Storer* v. *Brown, supra.* Finally, there is no time limitation upon the period during which an independent candidate may obtain signatures although, again, such limitations were upheld in Texas. *American Party of Texas* v. *White, supra*[5].

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4 However, if petitioner had not succeeded in overturning the filing deadlines in four other states, seven states, or 14% of the states, would have deadlines today more than six months before the general election—an indication that a substantial number of states value the interests asserted by Ohio. *See* Pet.Br.4n.6, 29-30.

5 California, Georgia, Maryland, New York, and North Carolina are examples of states having much higher petition signature requirements for independent candidates than Ohio, and New York requires a particular geographic distribution, unlike Ohio. *See* Cal. Elec. Code § 6831 (Deering 1977); Ga. Code Ann. § 34-1010 (1980); Md. Ann. Code of 1957, art. 33, § 7-1(b)(2) (Supp. 1981); N.Y. Elec. Law § 6-142 (McKinney 1978); N.C. Gen. Stat. § 163-122(a)(1) (Supp. 1981). New York, Texas and Nebraska do not allow primary election voters to sign an independent candidate's petition. N.Y. Elec. Law § 6-138(1) (McKinney 1978); Tex. Elec. Code Ann. art. 11.01b (Vernon 1969); Neb. Rev. Stat. § 32-504(2)(c)(1978),

The Court has taken a practical, objective approach in determining the burden of election regulation upon constitutional rights. "We must, therefore, inquire as to the nature, extent, and likely impact of the California requirements." *Storer* v. *Brown, supra,* 415 U.S. at 738. The Court noted in *Storer* that case law "provides no litmus-paper test" in this area and that decisions are "very much a 'matter of degree'." 415 U.S. at 730. Thus, in *Dunn* v. *Blumstein, supra,* in measuring the effect of a residency requirement for voter registration the Court looked at population statistics showing the number of persons who moved interstate to change their residencies during a given period of time, and in *Kramer* v. *Union Free School District, supra,* the Court carefully determined the identities of six classes of persons who were denied the franchise in New York school district elections.

In both *Storer* v. *Brown, supra,* and *Mandel* v. *Bradley, supra,* the Court in remanding the matters to the lower courts for further fact-finding posed the appropriate test as follows:

> [I]n the context of [California-Maryland] politics, could a reasonably diligent independent candidate be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?

415 U.S. at 742; 432 U.S. at 177.

Although the Court of Appeals below (A.17a) found this test to be "of limited usefulness in assessing burdens other than the difficulty of collecting signatures,"[6] the criteria suggested by the Court in these cases for measuring compliance with the test are objective in nature and would appear well-suited to determine the effect of a ballot access regulation upon a class of candidates.

In *Mandel,* the Court indicated that the lower court should have made findings "as to the difficulty of obtaining signatures in time to

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and California, Georgia, Nebraska, New York and Texas limit the period of time during which an independent candidate can obtain petition signatures. Cal. Elec. Code § 6864 (Deering Supp. 1981); Ga. Code Ann. § 34-1010 (1980); Neb. Rev. Stat. § 32-504 (1978); N.Y. Elec. Law § 6-138(4)(McKinney 1978); Tex. Elec. Code Ann. art. 11.01b (Vernon 1969).

6 One other lower court has applied this test to the timing of the candidate's decision to run for office. *Rock* v. *Bryant,* 459 F.Supp. 64 (E.D. Ark. 1978), *aff'd,* 590 F.2d 340 (8th Cir. 1978).

meet the early filing deadline." 432 U.S. at 178. Maryland law required the independent candidate to file more than 50,000 signatures for statewide office. In contrast, Ohio's signature requirement for independent candidates is minimal, and, unlike in Maryland, is essentially equivalent to the signature requirement to be met by partisan candidates by the same filing deadline.[7] *Mandel* also indicated that the lower courts should determine the moderating influence which might be exerted by other provisions of the state's elections laws upon the particular provision at issue. As respondent has argued, provisions of Ohio law other than the filing date are much less restrictive than those found in many states.

Most significantly, both *Storer* and *Mandel* emphasized the importance of examining the past experience of independent candidates in qualifying for the ballot in determining the burdensomeness of the restriction at issue. *Storer,* 415 U.S. at 742, *Mandel,* 432 U.S. at 177. Furthermore, in *Jenness* v. *Fortson, supra,* the Court also deemed it of significance that candidates had in fact been able to qualify for the ballot by the nominating petition route. 403 U.S. at 439. An examination of past experience is an objective way of determining whether ballot access regulation does in fact pose any burdens for a class of candidates.

Independent candidates in Ohio have been consistently successful in appearing on the statewide ballot since the March filing deadline was established in 1974 (A.75a-76a). No less than five independent candidates other than petitioner appeared on the 1980 presidential ballot, including one who filed over eleven thousand signatures three months in advance of the statutory deadline. Five independent candidates for President also appeared on the Ohio ballot in 1976, and another three independent candidates gained ballot position for the U.S. Senate race that year. In 1978, three independent candidates for governor appeared on the ballot, as did one independent

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7 Persons wishing to vie for Ohio's delegates to the national conventions of political parties must file by the same date as independent candidates written consent to the declarations of candidacy of their delegates, slates of delegates, and nominating petitions for delegates bearing 1,000 signatures secured statewide and 150 additional signatures from each Congressional District. Ohio Rev. Code Ann. §§ 3513.05, 3513.12 and 3513.151 (Page 1981). The numerical difference between these requirements and those for independent candidates reflects the more stringent requirements imposed on the former category of petitions, including that the signers be members of the political party within which the person wishes to compete and that geographical distribution requirements be met.

candidate for governor in 1974. Two independent candidates appeared on the Ohio ballot for the U.S. Senate seat in both 1974 and 1980. The success of these independent candidates in appearing on the Ohio ballot convincingly demonstrates that the filing deadline is no impediment to a reasonably diligent candidate, assuming that such candidate is willing to decide in March whether or not to run as an independent rather than wait and base his decision upon his lack of success in political party primaries held in other states.

The foregoing provides ample support for the Court of Appeals' determination below that "we do not think that the impact on the class of independent candidates of having to decide by March 20 whether to seek the Presidency is very large" (A.23a). Petitioner found the filing deadline burdensome for one reason and one reason alone. He had no difficulty in deciding very early (by June 1979) that he wished to run for President of the United States. Indeed, the Court of Appeals found that: "[i]t is little enough to ask of a person seeking one of the most powerful and influential posts on earth that he make up his mind whether to run seven and one half months before the election" (A.23a-24a). The Court of Appeals noted that "most serious candidates will have made a decision by that time, and to that extent a state requirement that the decision be made by March 20 is even less of a burden" (A.24a). Petitioner's problem was that he sought to try a different route to the ballot in midstream after his efforts to achieve the Republican nomination were clearly going to be unsuccessful.

Thus, the only real burden of Ohio's filing deadline for independent candidates is to prevent candidates such as petitioner from changing their minds in the middle of the election campaign concerning the method of seeking office. The Court of Appeals noted that "the March 20 filing deadline would for the most part screen out candidates in Anderson's position—those who decided to run, but did not decide early enough what form their candidacy should take. The Constitution does not require Ohio to alleviate the difficulty of choosing among alternative routes to the ballot." (A.24a). Such time limitations upon making decisions as to how one wishes to participate in the election process do not constitute the kind of ban upon freedom of association that would require a compelling interest justification. *Rosario* v. *Rockefeller, supra.* Indeed, in *Rosario* that Court upheld a New York statute which required voters to make up their minds as much as eleven months in

advance of the primary election as to with which political party they wished to affiliate. Petitioner was asked to make up his mind in Ohio only two and one-half months before the primary election.

Ohio's filing deadline imposes only minimal burdens, if any, upon the First Amendment rights of independent candidates for political office seeking to appear on the Ohio ballot. Therefore, no compelling interests need be shown in justification of the filing deadline's impact upon First Amendment rights.

D. The Ohio Filing Deadline Does Not Invidiously Discriminate Against Independent Presidential Candidates In Violation Of The Equal Protection Clause Of The Fourteenth Amendment.

Petitioner's complaint in the District Court alleged that the Ohio filing deadline denies "equal protection of the laws in that it creates an invidious, arbitrary and unjustified discrimination between partisan and independent candidates . . ." (J.A. 12-13). Petitioner argues that the Ohio filing deadline invidiously discriminates against independent candidates because they are required to file their nominating petitions in March of the presidential election year whereas candidates seeking political party nominations may be designated for the ballot by the political parties after their nominating conventions in August without such persons having filed delegate slates in Ohio in March. Implicit in this argument is the assumption that the appropriate comparison for equal protection purposes is between independent candidates and candidates seeking political party nomination. In fact, independent candidates and candidates seeking political party nomination are in salient ways so completely dissimilar that it is nearly meaningless to compare them. The state is obligated to recognize and account for these differences in its regulatory scheme; indeed, the "grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson, supra,* 403 U.S. at 442. A court must be certain that it has defined the classes to be compared in an appropriate fashion. As this Court said in *Califano* v. *Boles,* 443 U.S. 282, 293-4 (1979):

> [T]hose who seek benefits denied them by statute will frame the constitutional issue in a manner most favorable to their claim. *The proper classification for purposes of equal protection analysis is not an exact science, but scouting must begin with the statutory classification itself.* [Emphasis added].

The appropriate comparison under Ohio statutes for equal protection purposes is between independent candidates and political parties. These are the two entities which are recognized under Ohio law as having the right of access to the ballot. Ohio law requires the Secretary of State to place on the presidential ballot the names of the candidates "nominated as such by the national convention of a political party . . . and the names of those independent candidates nominated by petition." Ohio Rev. Code Ann. § 3505.10 (Page 1981). It is the political party which *selects* the nominee in August. Prospective nominees of political parties do not have it within their own power to become nominees in August simply by attracting popular support, whether shown by petition or otherwise. They can become nominees only if they are selected by those persons who were earlier picked to be delegates to the national conventions.

This Court has recognized the importance to political parties of the process of selecting presidential nominees. This process is protected by the First Amendment from substantial intrusion through state regulation. *Democratic Party of the United States* v. *LaFollette, supra,* 450 U.S. at 123-4:

> A political party's choice among the various ways of determining the make-up of a State's delegation to the party's national convention is protected by the Constitution.

See also Cousins v. *Wigoda, supra.* The Court of Appeals below recognized (A.26a) the paramount interest of political parties:

> Political parties have an existence separate from any individual they may sponsor as presidential candidates. The party has an interest of its own in being free to select the best candidate it can find to advance its views.

Ohio's laws reflect the fact that it is the political parties which are given the right to qualify for ballot position analogous to that given to independent candidates. The power of a political party to nominate a candidate for inclusion on the general election ballot is one which is *earned* on a date well in advance of the March filing deadline for independent candidates by virtue of the political party's having met the requirements of Ohio Rev. Code Ann. § 3517.01(A) (Page 1981). In exchange for the privilege of nominating candidates, the political parties must poll a certain percentage of the votes cast for either the governor or all presidential electors in the last

election. Parties which fail to win five percent of the total vote cast automatically cease to be political parties under state law and lose their rights to certify the names of their nominees for inclusion on the general election ballot. Such political parties or new political parties can only then gain the right to nominate candidates by the filing of petitions, 120 days before the primary election, bearing a number of signatures equal to one percent of the total vote for governor or presidential electors in the last general election. Parties seeking ballot position for their nominees on the general election ballot must, therefore, have qualified as "political parties" under state law at least forty-five days *before* independent candidates are required to file their petitions.

The Court of Appeals recognized that it is the political party, not the individual seeking party nomination, which has the right to determine the candidate in August, and this is a right which the political party earns prior to the time that independent candidates have to file their nominating petitions (A.27a):

> By earning for themselves a place on the ballot prior to February 4, political parties in Ohio earned the right to name persons at a later date to occupy that place. Properly understood, the provision that partisan candidates may run in the general election without running in the primary does not create a right for partisan candidates at all. It is a right of political parties, with rather an incidental effect on partisan candidates. If this flexibility affords political parties some advantage over independent candidates, the advantage is counterbalanced by the more stringent qualification requirements parties must meet.

Moreover, once the political party has qualified under Ohio law to select nominees, the process for getting its nominees on the general election ballot is considerably more difficult than it is for independent candidates. The independent candidate simply files his petition in March and then automatically appears on the ballot in November. The political party, on the other hand, must go through the additional process of holding primary elections and, in the case of the election for President, must further hold national conventions as part of putting its nominee on the general election ballot. Thus, there is no invidious discrimination against independent candidates when they are compared to the entity having the similar power of access to the general election ballot—the political party.

The Court of Appeals recognized the impropriety of attempting to compare persons seeking to become independent candidates for President with persons seeking political party nomination. The independent candidate's success "depends on his appeal as an individual" whereas the success of the person seeking political party nomination "is an amalgam of individual appeal and the party's appeal" (A.26a). The recognition of these differences is consistent with this Court's previous rulings that political party and independent candidate approaches are entirely different, *Storer* v. *Brown, supra,* 415 U.S. at 745, and that a state is not guilty of invidious discrimination simply because it recognizes the differences between different kinds of candidacies and provides different routes to the election ballot, *Jenness* v. *Fortson, supra. See also American Party of Texas* v. *White, supra,* 415 U.S. at 781-2. The Court of Appeals found that Ohio laws properly reflected the differences between the different types of candidacies (A.28a).

> Ohio's election laws reflect these differences in a permissible manner. Independent candidates need not satisfy the stricter filing requirements applicable to political parties. On the other hand, they must file much earlier than a partisan candidate who does not run in an Ohio primary, a reflection of the facts that the vast majority of partisan candidates file at the same time; that the voters have less a priori knowledge about independents than about partisan candidates; and that political parties have a legitimate interest in not having to announce all of their potential candidates at an early date, an interest which does not exist with independent candidates.

Even assuming that it is appropriate to compare independent candidates with persons seeking political party nomination, rather than political parties themselves, for purposes of equal protection analysis, invidious discrimination hardly exists between such classes of candidates. The identical filing deadlines imposed on persons who wish to launch campaigns for the presidency in Ohio, seeking either delegates to the national conventions or voters as independents in the general election, prevent the imposition of any discrimination among or between those potential candidates. Ohio Rev. Code Ann. §§ 3513.05, 3513.12, and 3513.257 (Page 1981). The simple imposition of identical filing deadlines upon different types of candidates cannot support a successful claim of a Four-

teenth Amendment equal protection violation. *American Party of Texas* v. *White, supra,* 415 U.S. 779 n.10; *Ring* v. *Marsh,* 335 U.S. 849 (1948), *mem. dismissing appeal from* 78 F.Supp. 914 (D. N.J. 1948).

The only possible discrimination would involve the candidate who chooses to bypass the presidential preference primaries and seek the nomination for the first time at the national convention. In the last decade, there have been a proliferation of presidential preference primaries, no less than thirty-six such primaries being held in 1980. The lower courts treated the likelihood of a candidate surfacing for the first time in this day and age at the national convention as theoretical at best (A.24a, 28a, 42a). This view is consistent with that taken by current students of American politics who recognize that the great increase in the number of primary elections, accompanied by a distribution of pledged delegates to candidates in proportion to votes received in the primary, has made it impossible for candidates in recent elections to bypass the primaries.[8]

Thus, as a practical matter, serious contenders for the presidential nomination invariably appear well in advance of the presidential election year, and certainly long before Ohio's March filing deadline. Indeed, petitioner announced his intention to seek the Republican nomination in June 1979 and filed in Ohio as a Republican candidate in March 1980. Under such circumstances, it would ignore the "realities of the electoral process," *Lubin* v. *Panish, supra,* 415 U.S. at 719 n. 5, to base a finding of invidious discrimination upon a largely hypothetical situation. Such "realities" must be taken into consideration. As the Court declared in determining an equal protection issue in *Pullman Co.* v. *Knott,* 235 U.S. 23, 26 (1914) (J. Holmes), a statutory classification "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are." Realistically, persons seeking the nominations of the political parties must cause their convention delegate slates to be filed together with nominating petitions in March in Ohio at the same time the independent candidates are required to file.

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8 Theodore H. White, *America In Search of Itself,* pp. 34, 73, 85, 286, 289 (1982); Thomas R. Marshall, *Presidential Nominations in a Reform Age,* pp. 1, 7, 14 (1981); James W. Davis, *Presidential Primaries: Road to the White House,* p. 4 (1980); Nelson W. Polsby & Aaron Wildavsky, *Presidential Elections,* pp. 80, 84, 88, 148 (1980); John W. Aldrich, *Before The Convention,* pp. 2-3, 8-10, Ch. 3 & 8 (1980); Steven J. Brams, *The Presidential Election Game,* p. 3 (1978).

Not only is the Ohio filing deadline non-discriminatory when its operation is viewed from a realistic perspective, but it also in fact eliminates discrimination among candidates which might otherwise obtain. One of the opinions in *Mandel* v. *Bradley, supra,* found Maryland law to be discriminatory because independent candidates were required to make their decision to run for office earlier than partisan candidates simply because the former had the burden of obtaining more than fifty thousand petition signatures, whereas the latter simply filed a declaration of candidacy. 432 U.S. at 181 (J. Stevens, dissenting). If Ohio law allowed a person to declare his independent candidacy for the presidency after March, precisely the type of discrimination feared by Mr. Justice Stevens would be present. "[A] sudden, unanticipated event of great national . . . importance," 432 U.S. at 181, might occur after the filing deadline for partisan candidates, motivating an independent to enter Ohio's presidential campaign. Yet, if a partisan candidate who had not filed were similarly motivated to seek delegate support in Ohio for his party's nomination for President because of the very same event, he would not be able to do so because the filing deadline had passed. Given the high probability that any serious candidate for a party's presidential nomination will be seeking delegate support in the presidential preference primaries, requiring a filing date for independent candidates identical to that for the delegate selection process is *much more likely* to avoid discrimination than is permitting entry by independent candidates as late as August.

If the independent candidate were permitted to file his nominating petitions as late as August, a further discrimination would be worked against party candidates who, petitioner argues, are free to make their decisions to seek party nomination for the first time at the political party conventions. This is because the independent candidate would have a much easier time qualifying for the general election ballot than the party candidate who makes a decision to seek the nomination for the first time at the convention. For the independent candidate must simply seek petition signatures while the party candidate must overcome the handicap of having most of the delegates already awarded to other party candidates as a result of the primary elections. That no manipulation of filing deadlines eliminates the supposed discrimination asserted by petitioner further indicates that the class of persons running as independent candidates and class of persons seeking political party nomination are so dissimilar as to defy meaningful comparison.

Ohio's election laws reflect the different methods of gaining access to Ohio's general election ballot in a permissible manner, and there is no invidious discrimination.

II.

A STATE STATUTE ESTABLISHING A FILING DEADLINE OF SEVEN AND ONE-HALF MONTHS IN ADVANCE OF THE ELECTION FOR INDEPENDENT CANDIDATES FOR THE OFFICE OF PRESIDENT OF THE UNITED STATES RATIONALLY FURTHERS LEGITIMATE STATE INTERESTS TO THE EXTENT NECESSARY TO RENDER IT CONSTITUTIONAL.

No proof has been offered in this case that the Ohio filing deadline in any way burdened any First Amendment rights. Petitioner has been able to point to no more than the effect of the filing deadline upon himself and his supporters, and, as has been argued above, petitioner can hardly establish a burden upon the consitutional rights of independent candidates simply because he changed his mind as to the manner in which he wished to seek the presidential nomination after Ohio's filing deadline had passed. Moreover, the filing deadline certainly does not invidiously discriminate against independent candidates when political parties are required to do far more than independent candidates in order to qualify their selections for the ballot. Under these circumstances, one can argue that *no justification whatsoever* need be provided in support of the Ohio filing deadline. It burdens no constitutional rights and, insofar as presidential candidates are concerned, U.S. Const. art. II, § 1, cl. 2, specifically authorizes the states to determine the manner of selection of presidential electors.

Respondent made such an argument without success to the Court of Appeals below based upon *Storer* v. *Brown, supra,* and *Mandel* v. *Bradley, supra.* In *Mandel,* an independent candidate challenged the constitutionality of the Maryland filing deadline which occurred on March 8—earlier than that in Ohio. The unreported decision of the District Court shows that Maryland, in defending its filing deadline, offered several justifying state interests, none of which were accepted by the District Court which found the statute unconstitutional.[9]

9 This decision is included in the Record as part of the Appendix in the Court of Appeals, pp. 92-104. Possible state interests are discussed at pp. 98-100. Petitioner tries to distinguish *Mandel* as a case involving the constitutionality of the

In the context of a case in which no interest had been found to justify the state statute, this Court nevertheless vacated the judgment of the District Court and remanded the matter for further fact-finding. Although the District Court had rejected all state interests offered in support of the statute, this Court nevertheless indicated that the District Court had "failed to undertake an independent examination of the merits." 432 U.S. at 177. This is a clear indication that even though no state interests of any kind can be offered in support of an election regulation, there remains the possibility that the state statute might nevertheless be constitutional if indeed it does not burden any constitutional rights.

The test established by this Court for determining the nature and effect of ballot regulation is the one first set forth in *Storer* and then repeated in *Mandel*:

> [C]ould a reasonably diligent independent candidate be expected to satisfy the [ballot access] requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?

Storer, 415 U.S. at 742; *Mandel,* 432 U.S. at 177. This test represents an objective method of determining the effect of ballot regulation on constitutional rights as a factual matter. As has been established above, Ohio's filing deadline satisfies this test in that independent candidates have qualified for the statewide ballot in Ohio with regularity. This can be contrasted to the situation in *Mandel* shown to exist upon remand after this Court's decision. Not one independent candidate for statewide office had qualified in Maryland during the six years the filing deadline had been in effect. *Bradley* v. *Mandel,* 449 F.Supp. 983 (D. Md. 1978).

Petitioner argues that the remands in *Mandel* and *Storer* were simply to determine whether the petition signature requirements were so burdensome that they were not well-tailored to meet the interests advanced by the state in preventing frivolous candidacies by requiring independent candidates to demonstrate a modicum of community support. However, neither this Court nor the District Court in *Mandel* made any reference to any state interest in demonstrating "a modicum of community support." Although

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petition signature requirement. However, the decision of the District Court makes it clear that the First Amendment challenge was directed at the early filing deadline. *See* pp. 95, 97, 99-100.

Storer does make reference to the state's interest in a manageable ballot, 415 U.S. at 743, it does so only in the context of a hypothetical situation in which the number of required petition signatures might approach ten percent of the eligible pool of signers, a number well in excess of anything ever approved by the Court and one which certainly would require a demonstration of substantial state interests. If the Court in Part II of *Storer* were simply "[a]pplying the compelling interest standard articulated earlier in its opinion," as petitioner erroneously argues (Pet.Br. 20n.13), there should have been no remand since the state would have failed to meet its burden of establishing that the petition signature requirement was the least drastic means to serve its end. *Illinois State Bd. of Elections* v. *Socialist Workers' Party, supra,* 440 U.S. at 184-6; *Dunn* v. *Blumstein, supra,* 405 U.S. at 335; *Williams* v. *Rhodes, supra,* 393 U.S. at 31. *Jenness* v. *Fortson, supra,* established that less drastic means of serving this interest were available. Instead, the remand was clearly to determine whether the petition signature requirements had any appreciable impact upon the exercise of constitutional rights such that the requirements would have to be justified.

The fact that compliance with the reasonably diligent independent candidate test might obviate the need for demonstrating any state interests in support of the ballot regulation is shown by the fact that the Court in *Storer* referred to application of this test as being "the inevitable question for judgment." 415 U.S. at 742. Since Ohio's filing deadline is neither burdensome nor discriminatory, no state interests need be shown in support of the statute. However, such interests do in fact exist.

A. The Ohio Filing Deadline Rationally Furthers Several Legitimate State Interests.

As has been argued in Point I above, Ohio's filing deadline need satisfy only the less stringent "rational basis" test since, to the extent that it burdens any constitutional rights, the burden is minimal and there is certainly no absolute deprivation of the rights of any class of persons to either vote or stand as candidates. Under the standard of review properly employed by the Court of Appeals below, Ohio's filing deadline is presumptively constitutional and may be overturned only if petitioner can demonstrate that it bears no rational relationship to any legitimate state purpose which might

be conceived. *McGowan* v. *Maryland*, 366 U.S. 420 (1961); *McDonald* v. *Bd. of Election Commissioners of Chicago, supra*, 394 U.S. at 809; *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970); *San Antonio Independent School District* v. *Rodriguez, supra*, 411 U.S. at 40, 44. The Court in *McGowan* v. *Maryland* stated:

> The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

366 U.S. at 425-6.

When the rational basis standard of review is being employed, it is not necessary that the state statute effectuate that state's goals with precision or that it be the least drastic method available to achieve the state's goals. *San Antonio Independent School District* v. *Rodriguez, supra*, 411 U.S. at 51:

> [T]he existence of 'some inequality' in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system . . . . It may not be condemned simply because it imperfectly effectuates the State's goals.

This is in contrast to the situation when the standard of review to be employed is "compelling state interest." Under such circumstances, the state must utilize the least drastic means to achieve its ends, and the statute must be drawn with precision. *Illinois State Bd. of Elections* v. *Socialist Workers Party, supra*, 440 U.S. at 185-6; *Dunn* v. *Blumstein, supra*, 405 U.S. at 342-3; *Kramer* v. *Union Free School Dist., supra*, 395 U.S. at 632-3.

Ohio's filing deadline has one clear effect upon the face of the statute. Since it requires independent candidates to file their petitions by the same day in March upon which candidates for the political party nominations for President must authorize slates of delegates, it requires that independent candidates and political party candidates seeking Ohio delegates be identified to the Ohio voter at the same time. As respondent argued to the Court of Appeals

below[10], "[s]imultaneous filing deadlines ensure that the voters will have an equal and substantial period of time during which to view all persons, partisan candidates and independent candidates alike, who are vying for the same office . . ." The Court of Appeals accepted voter education as a legitimate state interest:

> Ohio's early deadline ensures that voters making the important choice of their next president have the opportunity for a careful look at the candidates, a chance to see how they withstand the close scrutiny of a political campaign. (A.20a).
>
> Ohio may very reasonably conclude that requiring presidential candidates to be in the public eye for a significant time materially advances its interest in careful selection. (A.21a-22a).

Requiring simultaneous filing deadlines for independent candidates and candidates seeking Ohio delegates to the political party conventions is certainly rationally related to this interest in voter education. Indeed, simultaneous filing deadlines would appear to be the most logical method of attempting to put all candidates before the electorate at the same time. It is true that Ohio cannot achieve this interest with absolute perfection since there remains the theoretical possibility that a candidate could surface for the first time at the political party conventions, having by-passed the delegate selection process. However, the Court of Appeals recognized that it is unlikely that such a situation would occur (A.24a), and in any event, "Ohio has advanced this interest to the extent it can within the party system by requiring independent and substantially all partisan candidates to file by March 20" (A.22a). There is certainly justification for being concerned that independent candidates file at the same time as the "vast majority of partisan candidates" (A.28a), especially since "voters have less a priori knowledge about independents than about partisan candidates" (A.28a). Moreover, as has been shown above, a state may satisfy the rational basis test without achieving perfection in its regulation.

The provision of simultaneous filing deadlines for virtually all candidates seeking the presidency in Ohio not only enables the voters to identify the candidates so that the voters might then look

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10 Respondent's main brief, page 35, in the Record. Petitioner erroneously contends that respondent placed no reliance upon this argument in the Court of Appeals (Pet.Br. 5, 7, 22-3).

carefully at the positions taken by such candidates, but it also assists them in making decisions with all of the candidates before them as to which candidates to whom they may wish to give monetary support or otherwise assist in the campaign. Voters are encouraged to "make informed choices about where to allocate their support" (A.22a). These concerns with an informed electorate have indeed been recognized by this Court. A state has a "profound interest . . . in an informed electorate." *Dunn* v. *Blumstein, supra,* 405 U.S. at 362 (J. Blackmun concurring)[11]. *See San Antonio Independent School District* v. *Rodriguez, supra,* 411 U.S. at 36 n. 79.

Voter education has been recognized as a prime motivation behind various federal statutes impacting upon the elections process. In concluding that a presidential candidate had a right under the Federal Communications Act to access to television as early as December, 1979, eleven months before the election, the Court recently noted, *CBS, Inc.* v. *Federal Communications Commission,* 453 U.S. 367, 396 (1981):

> The First Amendment interests of candidates and voters, as well as broadcasters, are implicated by Section 312(a)(7). We have recognized that 'it is of particular importance that candidates have the . . . opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day' . . . . Section 312(a)(7) thus makes a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process.

The Court further noted the importance of the voter education interest in passing upon the validity of federal campaign regulation in *Buckley* v. *Valeo,* 424 U.S. 1, 14-15 (1976):

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11 Both petitioner and the ACLU as *amicus curiae* rely upon this case in arguing that voter education cannot justify the Ohio filing deadline. However, the Court simply held that voter education as a state interest did not withstand strict scrutiny in justifying a one-year durational residency requirement for voter eligibility since simple residency did not assure achievement of the asserted goal. Unlike the requirement in *Dunn,* the Ohio filing deadline simply assists the process of voter education; it does not prevent the uneducated voter from voting. Moreover, the filing date assists in educating all voters unlike a durational residency requiement which is directed only at recent arrivals to the state.

> In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.

In addition, several courts have found the state's interest in having the voters be exposed to a candidate for a period of time is sufficiently important to justify substantial residency requirements for candidates. *See, e.g., Sununu* v. *Stark,* 383 F.Supp. 1287, 1290 (D.N.H. 1974), *aff'd mem.,* 420 U.S. 958 (1975); *Hadnott* v. *Amos,* 320 F.Supp. 107, 119 (M.D. Ala. 1970), *aff'd mem.,* 401 U.S. 968 (1971).

Indeed, concern with an informed electorate was a primary motivating factor in the creation of the Electoral College by the framers of our Constitution. The framers perceived an absence of an informed electorate and viewed the Electoral College as being necessary in order to put the task of selection of the President in the hands of those persons most knowledgeable.[12] Ironically, the Electoral College has never operated the way the framers intended since the electors have historically been committed to vote for particular candidates, and the Ohio filing deadline can be seen as an alternative solution to the problem first posed by the framers of the Constitution.

Finally, Ohio has recognized the importance of voter education in other provisions of its elections laws. A candidate in Ohio is required to file campaign contribution and expenditure reports periodically, enabling the voter to inform himself on the sources of support for a candidate many months in advance of the general election. Ohio Rev. Code Ann. § 3517.10 (Page 1981). The major political parties are required to formulate platforms at biennial conventions. Ohio Rev. Code Ann. § 3513.11 (Page 1972). The voters in Ohio are entitled to have all political communications in the media attributed to the proper source, Ohio Rev. Code Ann. § 3599.09 (Page 1981), and voters are protected from false statements by candidates during campaigns, Ohio Rev. Code Ann. § 3599.091 (Page 1981).

12 *See* Max Farrand, *The Records of the Federal Convention of 1787,* pp. 29, 31, 114, 118-19 (1911); Alexander Hamilton, John Jay and James Madison, *The Federalist,* No. 68 at pp. 441-42 (1976); Max Farrand, *The Framing of the Constitution of the United States,* p. 166 (1967); Charles Warren, *The Making of the Constitution,* p. 628 (1929).

Ohio's filing deadline serves another legitimate state interest. The Court of Appeals below recognized that Ohio's filing deadline "would for the most part screen out candidates in Anderson's position—those who decided to run, but did not decide early enough what form their candidacy should take" (A.24a). Requiring simultaneous filing deadlines for independent candidates and candidates seeking Ohio delegates to the political party conventions has the obvious effect of preventing a candidate from changing his mind about which route he wishes to take to appear upon the presidential ballot. Thus, the filing deadline is certainly rationally related to preserving political stability in the sense of preventing a candidate from beginning a primary election campaign and then, when success is unlikely, suddenly determining instead to run as an independent. Such machinations by a candidate can be very damaging to state political party structure, as shown in this case by the fact that nearly half of the persons coordinating petitioner's campaign as an "independent" in Ohio had first performed similar functions in connection with his Republican campaign for President in Ohio (A.74a-75a). Thus, one effect of petitioner's independent candidacy was to entice away from the Republican Party in Ohio many of its hard-working activists.

This Court has recognized in *Storer* that a state might have a valid interest in structuring its election laws so as to prevent the general election ballot from being used as "a forum for continuing intra-party feuds" and to prevent "splintered parties." 415 U.S. at 735-6. Ohio's filing deadline operated to prevent petitioner from carrying his feud with fellow Republican Party presidential candidates to the general election ballot in Ohio by running as an independent candidate and from "splintering" the Ohio Republican Party by drawing away its activists to work in his "independent" campaign. It thus rationally furthered legitimate state purposes.[13]

Petitioner challenges the validity of the foregoing interests asserted on behalf of Ohio's filing deadline by arguing, first, that the deadline does not serve these interests. Petitioner claims that the filing deadline does not further voter education because it does not

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13 Courts in Ohio have recognized it to be a purpose of Ohio election laws to prevent intraparty feuding and preserve the integrity of political parties. *Foster* v. *Cuyahoga County Board of Elections*, 53 O.App.2d 213, 373 N.E.2d 1274 (Cuy. Co. Ct. App. 1977); *Lippitt* v. *Cipollone*, 337 F.Supp. 1405 (N.D. Ohio 1971), *aff'd mem.*, 404 U.S. 1032 (1972); *Kay* v. *Brown*, 424 F.Supp. 588 (S.D. Ohio 1976).

compel the candidates to campaign in Ohio and because voters are educated about presidential candidates from speeches and campaigning throughout the country, not the simple act of declaring candidacy. However, it is the act of declaring candidacy which causes the voter to *pay attention* to the positions of a particular person as reported in the media, whether or not that person ever visits the state. This is especially important in a presidential campaign when intensive reporting of candidate positions begins with the spring primaries, if not earlier. And it is even more important with respect to independent candidates, since they do not run in the primaries and need to be identified to the voters as candidates through the act of declaration as such. Such identification is important since, as the Court of Appeals recognized, voters know less about independents than partisan candidates (A.28a). If the independent candidates are identified to the voters when the partisan candidates take steps to win Ohio delegates, the voters can pay attention to the positions of all candidates and determine whether to participate in the primary election.

Petitioner also challenges the validity of the foregoing interests by arguing that the statute imperfectly serves these asserted interests. For example, petitioner argues that Ohio's filing deadline does not serve the voter education interest fully because the political parties are not requried to provide a list of potential candidates for President so that all conceivable candidates would be identified to the voters, rather than simply those who affirmatively seek delegates to the conventions. Petitioner also argues with respect to the political stability interest that Ohio's laws cannot have been designed to serve this interest because they do not regulate effectively in the sense that, for example, there is no requirement of disaffiliation for independent candidates for some period of time prior to the filing deadlines. However, a state statute need not be drawn with such precision that it solves all of the conceivable problems in a given substantive area. *Semler* v. *Oregon State Bd. of Dental Examiners*, 294 U.S. 608, 610 (1935) ["[t]he State was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way"]. *See also Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955), *reh. den.*, 349 U.S. 925 (1955) ["[t]he legislature may select one phase of one field and apply a remedy there, neglecting the others"]; *A.F. of L.* v. *American Sash & Door Co.*, 335 U.S. 538 (1949); *NLRB* v. *Jones & Laughlin Steel*

Corp., 301 U.S. 1, 46 (1937) ["legislative authority, exerted within its proper field, need not embrace all the evils within its reach"].

With respect to the political stability interest, petitioner argues that the filing deadline is ineffective to assure the "exclusiveness of different routes to the ballot" (Pet.Br. 34-5) because an independent might still be selected by a political party to appear on the general election ballot as a party presidential candidate whether he did or did not also file in March as an independent candidate. However, petitioner misconstrues the interest being asserted by the state. The filing deadline protects against that *switching* of types of candidacies during the middle of the primary election campaign which might cause the sort of intraparty feuding which, *Storer* recognized, would damage the state party structure. If the independent candidate has not filed as a party candidate, his selection by the party is not likely to cause such damage even if he had filed as an independent because he would have not utilized party resources as part of a primary campaign. While simultaneously filing as both a partisan candidate and an independent might cause adverse effects within the party, the legislature could have reasonably concluded that it is highly unlikely any politician would pursue the suicidal course of simultaneously indicating that he wanted a political party nomination but would run without it anyway. In short, the problem existed only on a theoretical level and needed no legislative solution. The Court of Appeals recognized that the filing deadline would operate mainly to preclude mid-primary campaign switching to independent candidacies (A.24a), and it is this problem the legislature no doubt intended to solve. The cases cited in the preceding paragraph provide authority for solving the most apparent problem first.

Petitioner argues that the Ohio filing deadline is overly restrictive in serving its interests. For example, petitioner argues that the filing deadline is only marginally related to the political stability interest in preventing a primary election candidate from becoming an independent candidate in April when his campaign is faltering because it also operates to bar an independent candidate from filing in April even if he has never sought to run in the primary election. However, the existence of "some inequality" in the state's regulatory scheme will not render it unconstitutional when the standard of review is "rational basis." *San Antonio Independent School District* v. *Rodriguez, supra,* 411 U.S. at 51. This Court upheld requiring voters to switch their party registrations as much as eleven months

in advance of the primary election in order to prevent one political party from "raiding" another one by party switching at the time of the primary election despite the fact that many, if not most, voters who might desire to switch party affiliations at the time of voting would not be part of any nefarious plot of one political party to raid another. *Rosario* v. *Rockefeller, supra.*

Petitioner also argues that the interests asserted by respondent are inconsistent with Ohio's legislative scheme and the legislative history. For this argument, petitioner relies primarily upon a recitation of the extremely restrictive effects of the Ohio laws invalidated by this Court in *Williams* v. *Rhodes, supra.* However, that legislative scheme has absolutely nothing whatsoever to do with the filing deadline in existence today. Indeed, as petitioner recognizes (Pet.Br.27), the petition route for independent presidential candidates was removed in 1949, *prior to* the change in the filing date for other independents in 1951 to move such date in advance of the primary election. Thus, any legislative history with respect to the changing of this date is irrelevant with respect to the presidential campaign.

When the legislature amended Ohio Rev. Code Ann. § 3513.258 in 1969, 133 Ohio Laws 29, in response to the *Williams* case, it created a filing deadline for independent presidential candidates for the first time in twenty years. The date selected was the same date required for independent candidates for other offices, a date which was specifically upheld the next year in *Sweetenham* v. *Rhodes,* 318 F.Supp. 1262 (S.D. Ohio 1970), *aff'd sub. nom. Sweetenham* v. *Gilligan,* 409 U.S. 942 (1972). That date was then moved in 1974 six weeks *closer* to the general election. These changes completely superseded earlier laws, *Oshe* v. *State,* 37 Ohio St. 494 (1882), and legislative history for earlier laws is thus irrelevant. The Ohio filing deadline should be reviewed in light of its own unambiguous and unequivocal terms, *Cleveland Trust Co.* v. *Eaton,* 21 Ohio St.2d 129 (1970), and because it is unambiguous, there is no reason at all to resort to legislative history as an aid to interpretation. *See Gulf Oil Corp.* v. *Kosydar,* 44 Ohio St.2d 208 (1975). Ohio law on its face does nothing more than require simultaneous filings by all candidates within Ohio's control, including presidential candidates who seek Ohio delegates to the national conventions, and there is no need to resort to a non-existent legislative history.

Petitioner cites *Weinberger* v. *Wiesenfeld,* 420 U.S. 636 (1975), for his proposition concerning legislative history. Yet, *Weinberger*

has no relevance in the instant case because this Court was in that case, unlike in this case, presented with an actual legislative history and a statutory scheme which established that the purpose of the challenged legislation was something other than represented by the government. And in *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972), and *Jimenez* v. *Weinberger,* 417 U.S. 628 (1974), the statutory schemes at issue in those cases belied the interests asserted in their defense. To the contrary in this case, the requirement of simultaneous filing deadlines for various candidates certainly serves the purpose of putting candidates in public view at the same time.

It should be added that the absence of any actual legislative history with respect to the Ohio filing deadline enacted in 1974 will not defeat the statute. "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them." *McDonald* v. *Bd. of Election Commissioners of Chicago, supra,* 394 U.S. at 809.

Finally, petitioner argues that the interests asserted by the state, even if legitimate in the context of elections to state office, have no relevance to the presidential election because "any given state primary" plays only a small role, if any, in the nomination of presidential candidates (Pet.Br.36). However, the state's interests are in educating its voters and in preventing damaging intraparty feuding within the state political parties, not in the extent to which the primary impacts the selection of the presidential candidates. The second branch of *Storer* v. *Brown, supra,* involved the presidential election, and the Court viewed the validity of the petition signature requirements in California in light of the *same* standards later employed for such requirements in *Mandel* v. *Bradley, supra,* a case *not* involving a presidential election. There was no suggestion in *Storer* that California's fairly rigorous petition signature requirements for independent candidates ought to be viewed with suspicion upon the grounds that the state had little interest in determining the level of community support for a presidential candidate.

B. Although Not Required to Do So, The Ohio Filing Deadline Promotes Compelling State Interests.

Given the minimal nature, at most, of the burden imposed by Ohio's filing deadline upon First and Fourteenth Amendment

rights, requiring Ohio to justify its filing deadline by a showing of compelling state interests would be inconsistent with the long line of cases of this Court discussed in Part I of this brief. These cases require that a state's election regulation be justified by a showing of compelling state interests only when such regulation severely burdens constitutional rights by, *e.g.*, totally depriving a group of voters or candidates from voting or standing for office. Nevertheless, even though Ohio's law need not be so strictly scrutinized, it is in fact supported by compelling state interests.

When the "compelling state interest" standard of review has been employed, it has generally been required that the state statute be drawn with precision and represent the "least drastic means" of serving the state interest. *Illinois State Bd. of Elections* v. *Socialist Workers Party, supra; Dunn* v. *Blumstein, supra.* One must be careful, however, not to allow words such as "compelling state interest" and "least restrictive means" to replace substantive analysis. Such language is "no substitute for the hard judgments that must be made," and decisions in this area are "very much a 'matter of degree'." *Storer,* 415 U.S. at 730.

> I have never been able fully to appreciate just what a 'compelling state interest' is. If it means 'convincingly controlling' or 'incapable of being overcome' upon any balancing process, then, of course, the test merely announces an inevitable result, and the test is no test at all. And, for me, 'least drastic means' is a slippery slope and also the signal of the result the Court has chosen to reach. A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation, and thereby enable himself to vote to strike legislation down.

Illinois State Board of Elections v. *Socialist Workers Party, supra,* 440 U.S. at 188-9 (J. Blackmun concurring). Instead, application of the "compelling state interest" standard of review should mean simply that the court looks more closely at the interests asserted in support of the state statute and that the presumption of constitutionality disappears with the state then bearing the burden of justifying its statutes.

> Thus phrased, the constitutional question may sound like a mathematical formula. But legal 'tests' do not have the precision of mathematical formulas. The key words emphasize a

> matter of degree: that a heavy burden of justification is on the State, and that the statute will be closely scrutinized in light of its asserted purposes.

Dunn v. *Blumstein, supra,* 405 U.S. at 342-3.

The first interest offered by Ohio in support of its filing deadline is the provision of Ohio's voters with an opportunity to take a careful look, simultaneously, at virtually all of the candidates seeking the presidency—the voter education interest. The filing deadline also serves the related interest of enabling Ohio's voters to determine among which candidates to allocate their support. Ohio's filing deadline serves these interests by requiring all candidates seeking the presidential nomination in Ohio, whether as independents or by seeking Ohio's delegates to the national political conventions, to cause the appropriate petitions to be filed by the same date in March.[14] It is difficult to imagine a less restrictive way of serving these interests. If the candidates are to be identified to Ohio's voters, then they must be required to express their intentions publicly in some manner.

One could conceivably require simply a declaration of candidacy without the filing of any petition signatures. However, Ohio has virtually done this by requiring such a small number of signatures from independent candidates that it equaled in 1980 only .12% of the persons voting in the preceding presidential election. Petitioner does not quarrel with the minimal burden of acquiring these signatures, and indeed he acquired more than three times this number of signatures in only five days (A.74a). The signature burden can be contrasted to the five percent signature requirement upheld in *Jenness* v. *Fortson, supra.* Surely, such an insignificant signature burden should not prevent the state's statute from meeting the "heavy burden of justification" required by *Dunn* v. *Blumstein, supra,* especially when the state has a valid interest in requiring petition signatures to demonstrate community support, *Storer* v. *Brown, supra,* 415 U.S. at 743. If it did, the prophecy of the dissenting opinion in *Dunn* would certainly be fulfilled:

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14 The March filing deadline is necessary for candidates running in the primary election because of the administrative tasks which must be performed in connection with that election (A.76a-79a). Thus, if independents are to be identified to the voters at the same time as party candidates in the primary, they must also file in March.

> To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.

405 U.S. at 363-4 (Ch. J. Burger dissenting).

The fact that the voter education interests might be even better served, as petitioner argues, if some official, such as the Secretary of State, were required to list all potential presidential candidates on the primary ballot is hardly any argument that the existing filing deadline is not the least restrictive means of achieving the state interests. The listing of additional potential candidates seeking the nominations of the political parties would hardly make the statute any less restrictive as far as independent candidates are concerned. Since independent candidates are not working within political parties, the only way they may be identified to Ohio voters is if they are required to declare their candidacies simultaneously with identification of political party candidates.

The other interest advanced by Ohio in support of its filing deadline is the preservation of political stability by preventing intraparty feuding during the primary election campaign and the splintered state political parties which result therefrom. Petitioner's candidacy is a perfect example of the situation the statute effectively prevents. Petitioner sought the Republican Party nomination for President in Ohio by causing a slate of delegates to be filed with his written authorization by March 20, 1980. Then, after he had been soundly defeated in a number of Republican Party primaries in other states, he determined on April 24, 1980, to seek the presidential nomination instead as an "independent" candidate. He thus carried his differences with fellow Republican candidates in Ohio outside the primary election process and to the general election ballot by seeking to appear as an independent candidate thereon in November. This clearly "splintered" the Republican Party in Ohio, as shown by the fact that petitioner drew away from the Republican Party many of its activists who had been working for his Republican candidacy (A.74a-75a).

Ohio's filing deadline is certainly less restrictive in achieving its political stability purposes than the statutory scheme upheld in *Storer* v. *Brown, supra.* There, the Court upheld California laws which required true disaffiliation by independent candidates in the

sense that they could not have been affiliated with political parties within the year immediately preceding the filing of petitions as independent candidates. Ohio's law is considerably less restrictive and is limited to preventing the kind of disruption within the state Republican Party which occurred as a result of petitioner's candidacy. Ohio did not require that petitioner have been disaffiliated from political parties for any period of time prior to the filing deadline. Ohio law limits independent candidacies only in that a candidate cannot commence to seek a political party's nomination in Ohio, thereby attracting party volunteers and financial support, and then shift course in the middle of the stream by attempting to run as an independent candidate if the effort to seek the political party nomination is not succeeding.

One can hardly imagine a less restrictive way of preventing a candidate who seeks a political party nomination by filing in March from switching to an independent candidacy in April than by requiring that both independent candidates and political party candidates file their petitions at the same time in March. Petitioner argues that Ohio's "sore loser" statute, Ohio Rev. Code Ann. § 3513.04 (Page 1981), somehow suggests that this cannot have been the purpose of the filing deadline since that statute would by itself prevent political party candidates who are defeated at the primary election from then seeking to run as independent candidates. However, that statute is conceded to be inapplicable to the situation in which petitioner found himself, namely, that he wished to switch his candidacy during the middle of the primary election campaign in April. There can hardly be anything wrong with Ohio seeking to effectuate its legitimate interests through a second statute when the first does not address the particular problem.

Nor should petitioner's compliance with Ohio Rev. Code Ann. § 3513.30 (Page 1981), by withdrawing from the Republican primary ballot, be somehow read to imply a license to run as an independent candidate. That statute provides for the removal of a withdrawn candidate's name from the ballot, and it serves the obvious purpose of avoiding voter confusion on election day. Compliance with this statute should not imply freedom from other applicable regulation.

Petitioner also argues that the filing deadline for independent candidates is not the least restrictive means of achieving the political stability interest because it would also bar the independent candida-

cies in April or later of persons who had never sought the nominations of political parties by filing declarations of candidacy in March. Petitioner, however, does not represent such independent candidates since he did in fact seek Republican delegates in Ohio in March. Thus, the Court need not reach the question of whether this consequence of Ohio's filing deadline would be enough so that the statute could not withstand strict scrutiny. Petitioner has no standing to assert the effects of the Ohio filing deadline on independent candidates not in his circumstances. *Rosario* v. *Rockefeller, supra,* 410 U.S. at 759 n.9; *Clements* v. *Fashing, supra,* 102 S.Ct. at 2848 n.6; *Broadrick* v. *Oklahoma,* 413 U.S. 601, 610 (1973). The Court dealt with a similar situation in *Storer* by stating:

> In any event, neither Storer nor Frommhagen is in position to complain that the waiting period is one year, for each of them was affiliated with a qualified party no more than six months prior to the primary. As applied to them, [the California statute] is valid.

415 U.S. at 734.

> [I]f a candidate is absolutely and validly barred from the ballot by one provision of the laws, he cannot challenge other provisions as applied to other candidates.

415 U.S. at 737.

Ohio's filing deadline represents the least restrictive means of achieving the state interests in question, and it, therefore, withstands strict scrutiny.

III.

SUMMARY AFFIRMANCES OF THIS COURT IN OTHER CASES REQUIRED THE LOWER COURTS TO SUSTAIN THE CONSTITUTIONALITY OF THE OHIO FILING DEADLINE AGAINST FIRST AMENDMENT CHALLENGES.

The Court of Appeals in upholding the validity of the Ohio filing deadline for independent candidates against First Amendment attack simply applied the principles established in two decisions of the lower courts which had upheld similar filing deadlines and been summarily affirmed by this Court.

In *Sweetenham* v. *Rhodes,* 318 F.Supp. 1262 (S.D. Ohio 1970), independent candidates for governor and Congress, who failed to comply with the Ohio filing deadline, challenged the constitutional-

ity of that deadline. At that time the filing deadline was in early February. The District Court rejected the challenge. It found that the state had an interest in having all persons seeking elective office officially declare their intention to do so on, or before, a certain date preceding the election. 318 F.Supp. at 1273. If the court were simply ruling on the equities, as petitioner argues, there would have been no need to make this finding which relates to the requirements of the statute itself, not the particular conduct of the plaintiffs.

The candidates appealed to this Court. In their Jurisdictional Statement they clearly raised the validity of the February filing deadline upon First Amendment grounds. Their second question for review was (J.A.18):

> 2) Where a state has prescribed that independent candidates for political office must file their nominating petitions approximately nine months before the general election and where such requirement is not shown to be justified by any compelling state need, are the First and Fourteenth Amendments contravened?

This Court rejected the claim and summarily affirmed the judgment of the lower court. *Sweetenham* v. *Gilligan,* 409 U.S. 942 (1972).

The characterization of the issue in the *Sweetenham* appeal as set forth above by appellants in the Jurisdictional Statement was accepted without reservation by appellee State of Ohio in its Motion To Affirm The Judgment (Record, Addendum to Appellant's Brief in Court of Appeals, pp. 61-65). Appellee there stated (p.64):

> *The sole issue in this appeal is the constitutionality of the following provision of sections 3513.257 and 3513.258, Ohio Revised Code,* which requires nominating petitions to be filed not later than 4:00 P.M. of the ninetieth day before the first Tuesday after the first Monday in May, immediately preceding [the] general election. (Bracketed material in original). (Emphasis added).

The situation in *Pratt* v. *Begley,* 352 F.Supp. 328 (E.D. Ky. 1970), was substantially the same. Independent candidates challenged the March 31 filing deadline in Kentucky. The District Court found that the deadline was reasonable in light of legitimate state interests. In so finding, it specifically noted that the deadline was "not unconstitutionally discriminatory," making it clear that the ruling was on the validity of the statute, not plaintiffs' entitlement to relief, as

petitioner argues. *Id.* at 330. On appeal this Court summarily affirmed. 409 U.S. 943 (1972).

In ascribing precedential effect to these summary affirmances on the First Amendment issue, the Court of Appeals was also influenced by the Court's later decision in *Mandel*. In that case, an independent candidate for Congress challenged the Maryland requirement of submitting signatures from three percent of the qualified voters by March 8. This Court remanded the case for the lower court to determine whether a "reasonably diligent independent candidate" could satisfy the requirement.

The Court of Appeals noted that there was no reason to remand the case to determine the difficulty of obtaining signatures if it were unconstitutional even to require a person to decide whether to run or not by that date.

The Court of Appeals, recognizing the decisions in *Sweetenham* and *Pratt* were decisions on the merits, found that they foreclosed the First Amendment challenges of petitioner. Petitioner argues that the lower court gave an overly broad effect to those decisions. He claims that the candidates in those cases were so tardy in filing that they were not equitably entitled to relief. There is nothing in the opinion of either case that would indicate that this played any part in the decision. Both courts considered and rejected the merits of the constitutional challenge.

The Court of Appeals noted that this Court did not decide *Sweetenham* and *Pratt* until long after the elections involved in those cases. By that time any decisions based upon the equities had been mooted.[15] It, therefore, found the only purpose of the judgment was to settle the constitutionality of the Ohio and Kentucky deadlines for future elections (A.10a).

Contrary to the assertion of petitioner, the Court of Appeals was not suggesting that this Court had discretionary jurisdiction, similar to *certiorari* jurisdiction, to decline to entertain the appeals. If, however, this Court felt that the only issue presented was one of the equities, it should have dismissed the appeals as being moot rather than have affirmed the judgments of the lower courts.

Petitioner also argues that the Court of Appeals failed to take into account that *Pratt* and *Sweetenham* did not involve application

15 A decision on a question of equities, unlike a decision of constitutional law on an elections question, would not be one of those issues capable of repetition yet evading review which justify ignoring traditional mootness doctrine. *Cf. Storer, supra,* 415 U.S. at 737 n.8.

of a March filing deadline to an independent presidential contender, as distinct from a contender for an office in which the primary election determines the candidate. However, this difference is significant only insofar as the issue of whether there is invidious discrimination in violation of the Equal Protection Clause because of the selection of presidential candidates subsequent to the primaries. The Court of Appeals only followed these cases on the *First Amendment* issue (A.8a, 12a).

The Court of Appeals acted consistently with the holding of this Court that lower courts are bound by summary decisions of this Court "until such time as the Court informs [them] that [they] are not." *Hicks* v. *Miranda,* 422 U.S. 332, 345 (1975). *See generally,* Note, *The Precedential Effect of Summary Affirmances and Dismissals for Want of a Substantial Federal Question by the Supreme Court after Hicks v. Miranda and Mandel v. Bradley,* 64 Va.L.Rev. 117 (1978). Respondent submits that, if anything, the Court of Appeals gave too narrow an effect to the *Sweetenham* and *Pratt* decisions. The plaintiffs in *Sweetenham,* in their Jurisdictional Statement, raised a challenge to the Ohio filing deadline (which at that time was even earlier) identical to that raised in this case. This Court rejected that challenge and affirmed the judgment of the lower court which upheld the validity of the deadline.

In *Mandel,* 432 U.S. at 176, this Court explained that summary affirmances without doubt reject the issues presented in the Statement of Jurisdiction. Such decisions prevent lower courts from coming to opposite conclusions on the issues presented and necessarily decided by those actions. Unlike in *Mandel,* the Court of Appeals in this case was presented with a filing deadline from the same state statute which had been involved in *Sweetenham.* The only difference was that the filing in *Sweetenham* was even earlier than that in this case. Unlike in *Mandel,* there were no other relevant provisions of state law from the earlier decision, such as the Pennsylvania limitation upon the period of time during which petition signatures could be gathered, which would make this case distinguishable from *Sweetenham.* Petitioner's challenge to Ohio's laws was limited to the filing deadline itself, and thus the overall impact of several different election regulations was not in issue. In fact, the District Court recognized the singular character of the issue in this case stating: "the sole statutory provision at issue in this case is the first sentence of R.C. 3513.257 [footnote omitted] . . . " (A.32a).

In *Sweetenham,* this Court rejected the very same constitutional challenge now presented again in this case to a filing deadline which is not as early. Surely the prior judicial approval of a *greater* restriction subsumes within it implicit approval of a lesser restriction of the same type. *See,* Note, *supra,* 64 Va. L. Rev. at 124-5. After this Court affirmed the validity of the even earlier filing deadline, the lower courts were not free to find it unconstitutional. The Court of Appeals, therefore, had no choice but to find that petitioner's First Amendment challenges were foreclosed.

CONCLUSION

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Brief for Respondent's were sent this _____ day of September, 1982, by U.S. first class mail, postage prepaid, to Mitchell Rogovin, Esq., Rogovin, Huge & Lenzner, 1730 Rhode Island Avenue, N.W., Suite 1100, Washington, D.C. 20036, counsel for petitioners. All parties required to be served have been served.

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Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 24 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1635

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOHN B. ANDERSON, GEORGE H. HETRICK, LESLIE LAUFMAN, M.D., GERALD M. EISENSTAT,
Petitioners,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of the State of Ohio,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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OCTOBER TERM, 1981

No. 81-1635

JOHN B. ANDERSON, GEORGE H. HETRICK, LESLIE LAUFMAN, M.D., GERALD M. EISENSTAT,
Petitioners,

v.

ANTHONY J. CELEBREZZE, JR., in his official capacity as Secretary of State of the State of Ohio,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY BRIEF

ARGUMENT

Ohio has devoted a substantial portion of its argument to two propositions: first, that its early filing deadline does not impose any substantial burden on independent candidates or their supporters, and thus need not be justified by any compelling or even important state interests; and second, that the discrimination claimed by petitioners is merely hypothetical and unreal. We show below that the discrimination worked by Ohio's filing deadline, which excludes from the ballot all independent candidates who do not file their nominating papers more than five months before major and minor party candidates need be chosen, is real and substantial. Moreover, in all of the cases cited by the State, whether this Court used the talismanic phrase "compelling interest" or not, it is readily apparent that the restrictions on voters' rights and access to the ballot were carefully scrutinized

in accordance with the particularized legislative purposes allegedly sought to be achieved. Ohio's argument that the statute imposes no substantial burden rests on the erroneous premise that a state may insulate any unreasonably early filing deadline for independent candidates by simply decreasing its signature requirements. But more important, Ohio's argument ignores the substantial burdens that flow from the discrimination Ohio makes between the time when independent, as opposed to partisan, presidential candidates must qualify for the ballot.

Nor can the early filing deadline be justified by asserted state interests in promoting voter education, reducing intra-party strife during the primary season, or protecting the major parties from losing their active workers to independent contenders. There is no evidence that the deadline was ever intended to serve these purposes, nor does it in fact do so.

I. THE DISCRIMINATION WORKED BY OHIO'S EARLY FILING DEADLINE IS REAL AND SUBSTANTIAL AND NOT, AS OHIO SUGGESTS, MERELY HYPOTHETICAL

Ohio's early filing deadline prevents any independent candidate for the Presidency from appearing on the State's general election ballot unless he declares his candidacy and fully qualifies by March 20. No such restrictions are imposed on candidates nominated by major or minor political parties. Party candidates are allowed to emerge during or at the end of the nominating season and still appear on Ohio's general election ballot, regardless of prior filing, declaration of candidacy, or activity in Ohio. By contrast, independent candidates must file for the November general election at a time, early in the spring, which is long before the most likely partisan candidates, and the platforms on which they will run, are usually known.

In arguing that its filing deadline does not discriminate against independent candidates, the State is forced

to make fundamentally contradictory arguments. First, Ohio contends that the appropriate comparison is between independent *candidates*, on the one hand, and political *parties* on the other hand, and that party and independent candidacies are so fundamentally different that it in no way discriminates against independents simply because it treats them differently. Ohio then goes on to argue that if the appropriate comparison is between independent and partisan *candidates*, there is no discrimination because the State has merely implemented its legitimate interest in treating all candidates *the same* by requiring them all to file by the same date—in spite of the fact that partisans are filing for primary elections (held five months prior to the general election) in which independents do not run, and in which partisans need not run in order to obtain general election ballot access.[1]

As petitioners showed in their main Brief, however, whether the comparison is made between independent and partisan candidates, or their supporters, the discrimination is precisely the same. Party members are free until a date in late summer to throw their support behind a late-emerging presidential candidate who will stand the best chance of success in the general election, and partisan candidates are free to vie for the party (major *or* minor party) nominations until this time, without regard to their previous filing or candidacy in the Ohio primaries. Independent voters in Ohio are precluded from supporting a viable independent presidential candidate unless they mobilize to do so prior to March 20; even the most nationally-respected, third-force, independent candi-

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[1] Indeed, as discussed in petitioners' main Brief, unlike primaries for all other offices (where the winners thereby achieve general election ballot access), the presidential preference primaries do not bear any necessary relationship to the ultimate choice of the party nominees who will appear on the general election ballot. For example, under Ohio law convention delegates are not obligated to cast first-ballot convention votes for the candidate to whom they were pledged in the primary. *Cf.* Ohio Rev. Code Ann. § 3513.12 (Page 1981).

date who may wish to offer himself as an alternative to the two major party nominees cannot do so in Ohio unless he chooses to run long before the most likely major party nominees and their national programs can confidently be identified.

The State contends that political parties must "do more" to secure ballot access for presidential candidates than groups of independent voters. Brief For Respondent [hereinafter cited as Respt's Br.] at 25-26. The major parties, of course, need not "do" anything at all. Based on prior electoral results, they are granted the privilege of having a guaranteed line for *every* office on Ohio's ballot, *and* the privilege of waiting until late summer to designate their presidential nominee. Minor and new parties must file petition signatures 120 days prior to the primary election. Ohio Rev. Code Ann. § 3517.01(A) (Page 1981). The validity of these requirements is not, of course, here at issue;[2] but since such parties must hold primary elections under Ohio law, valid state administrative requirements obviously support a filing deadline for these parties at some point well in advance of the primary. Under Ohio law, these parties gain the same competitive advantage vis-a-vis independents as that enjoyed by major parties: the opportunity to postpone until late August selection of their presidential candidates.[3]

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[2] The Court of Appeals for the Eighth Circuit has recently invalidated on constitutional grounds "new party" filing requirements (June 1 deadline; 15,000 signatures) that are not dissimilar to those of Ohio (February deadline; about 30,000 signatures). *McLain v. Meier*, 637 F.2d 1159 (8th Cir. 1980).

[3] Minor and new parties need not even hold conventions, since under Ohio law they are entitled to designate to state authorities a presidential candidate to appear on the ballot who is chosen by any procedure "authorized by . . . party rules," Ohio Rev. Code Ann. § 3505.10 (Page 1981)—including, presumably, the hand-picking of the nominee by a few top party officials.

As the Brief Amicus Curiae of the Libertarian Party makes clear, however, the discriminatory aspect of Ohio's requirements for minor and new party presidential candidates has deterred such

The State further argues that the discrimination complained of by petitioners is necessarily based upon an "unrealistic and hypothetical possibility," Respt's Br. at 6, that meaningful contenders for the major party nominations will emerge late in the presidential primary process. The modern growth of presidential primary elections, Ohio contends, has made it "*impossible* for [party] candidates in recent elections to bypass the primaries." Respt's Br. at 28 (emphasis added).

This argument is historically and empirically unsound. In four of the last eight presidential election campaigns (1952, 1956, 1964 and 1968) *both* the eventual Democratic *and* Republican nominees gained their party's nominations in spite of the fact that their names did not appear on Ohio's primary ballots.[4] And in 1960, while Richard Nixon, who was his party's nominee, appeared on Ohio's Republican primary ballot, none of the leading Democratic contenders—Humphrey, Stevenson, Symington, Johnson, or the eventual nominee Kennedy—ran in Ohio's Democratic primary.[5] Thus, what respondent terms "impossible" in fact reflects the experience in Ohio of the

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parties from exposing themselves to the substantial political risks involved in seeking ballot access under these provisions. Such parties are *required* to hold open primaries, Ohio Rev. Code Anr. § 3517.014 (Page 1972), while the major parties are permitted to hold closed primaries, *id.* § 3513.19 (Page 1981). According to amicus' figures, ten of eleven minor or new party candidates for President in the last three presidential elections (other than those appearing on the ballot by virtue of a court order) elected to appear as "independents" by filing petition signatures under Ohio Rev. Code Ann. § 3513.257 (Page 1981). Brief Amicus Curiae of the Libertarian National Committee, at 11-12, n.7. The net result, the Libertarians complain, is that Ohio law imposes a unique and substantial burden on the rights of minor and new parties seeking ballot access in Ohio for their presidential candidates.

[4] Congressional Quarterly, Inc., *Presidential Elections Since 1789* 151-173 (2d ed. 1979); J. Davis, *Presidential Primaries* 318-357 (1980).

[5] See texts cited in note 4, *supra*.

majority of major-party presidential nominees in the last eight presidential elections.

Respondent has sought to discount this recent history by focusing in his brief solely upon the 1976 and 1980 elections. Even in those years, however, major political figures entered the nominating process after Ohio's primary election filing deadline, even though they did not prove ultimately successful. For instance, in 1976 Jerry Brown did not declare his candidacy until late March and did not run in Ohio's primary, but nonetheless prevailed in a number of major primaries, polled the second highest number of votes in all the primaries combined (to Jimmy Carter), and was regarded by many as a bona fide presidential contender.[6] Similarly, in 1976 former Vice President Hubert Humphrey sought, albeit unsuccessfully, to present himself as a convention draft candidate, even though he had participated in no primaries.[7]

That a late-emerging, dark horse or compromise candidate did not win the nomination of a major party in 1976 or 1980 does not make it impossible or even unlikely that candidates will attempt to gain the nomination through such a route in the future, and may be successful in doing so. To be sure, the laws of Ohio and other states do not stand in their way. Insofar as primary elections have become more important in recent campaigns, this is due not to the dictates of state law, *cf. Democratic Party of United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981), but to very recent changes in major party rules governing selection procedures for convention delegates. Not only are these rules customarily changed every four years, the present trend seems to be in the direction of deemphasizing the importance of primaries. For example, in 1982 the Democratic National Committee modified its rules for appor-

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[6] *See* J. Aldrich, *Before the Convention* 48 (1980); J. Davis, *supra* note 4, at 17, 348-356.

[7] J. Davis, *supra* note 4, at 184-86, 200.

tionment and selection of national convention delegates to increase the proportion of delegates not chosen in primaries or caucuses, but consisting of key party and elected officials, so that over fourteen percent of the delegates to the next Democratic Convention will be unpledged and uncommitted. The Democrats' Hunt Commission explained the reasons for these changes as resting on a desire to move away from heavy reliance upon primary results, and to "return *decision-making discretion and flexibility* to the convention itself." Report of The Commission On Presidential Nomination, Adopted by the Democratic National Committee March 26, 1982, at 15-17 (emphasis in original).

In any event, the appropriate subject of constitutional scrutiny is a comparison of what Ohio law requires of independents as opposed to partisan candidates—not a comparison of Ohio's legal requirements for independents with the political constraints placed upon partisan contenders by the practical ramifications of changing party rules. Viewed in this light, the conclusion is inescapable that state law discriminates against independent presidential candidates.

II. THE BURDEN OHIO'S EARLY FILING DEADLINE IMPOSES ON FUNDAMENTAL RIGHTS IS SUBSTANTIAL, AND THUS CAN BE SUSTAINED ONLY BY A COMPELLING STATE INTEREST

While the above-described discrimination alone would require heightened scrutiny under this Court's equal protection decisions, Ohio's early filing deadline imposes particular burdens on independent presidential candidates which also require rigorous scrutiny, for these candidates serve a special role, different from minor party candidates.

A minor party is likely to be committed to a particular ideology, frequently an ideology far from the mainstream of American politics. It may continue to function, and to perform a useful function in the marketplace of ideas, without ever holding out any hope of actual

electoral success. The independent candidate, however, by definition is not the candidate of an ongoing, institutionalized party; is not seeking power for an entire group of people associated with the party as a loyalty-generating institution; and is not seeking to promote a host of related office seekers. He is ordinarily seeking to create a single-election constituency, and perhaps even to attract to public appointive office, in the event that he wins, well-qualified persons from both the major political parties. The independent candidate, in distinction to the candidates of minor parties, may seek office because of dissatisfaction with the actual choices being offered that year by the major parties, and not because of a belief that a new party institution is required. This kind of independent candidate is more likely than the ideological minor party to pose an electoral choice attractive to a large group of American voters. See Brief For Petitioners 15-19 (recent decline in partisanship and growth of independent segment of electorate). Yet it is this independent candidate, and his supporters, who are most disadvantaged by an unusually early deadline.

The State argues that the voting rights of that substantial portion of the electorate in Ohio who wished in April 1980 to advance John Anderson as an independent alternative to the likely choices of the Republican and Democratic parties would only have been "minimally" affected, if at all, by his exclusion from the ballot because this group of voters had *other* "independents" from which they could choose—for instance, Gus Hall of the Communist Party, Ed Clark of the Libertarian Party, and Deirdre Griswold of the Workers World Party, all of whom qualified by filing petitions. However, as this Court noted in *Lubin v. Panish*, 415 U.S. 709, 716 (1974), in striking down a $701.60 filing fee for ballot access in a primary election:

> [T]he right to vote is 'heavily burdened' if that vote may be cast only for one of two candidates in a primary election at a time when other candidates

> are clamoring for a place on the ballot. It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues.

If this is true for a candidate for county supervisor, as in *Lubin v. Panish*, it is *a fortiori* true in the case of a viable, independent candidate for President of the United States with widespread national support seeking to offer himself as an alternative nearly five months before the party candidates even need be chosen.

Ohio has cast about through this Court's past decisions and attempted to create an argument that it need not justify its early filing deadline at all because the deadline does not "as a factual matter severely burden constitutional rights." Respt's Br. at 13. According to Ohio's theory, since the number of petition signatures it requires an independent candidate to file (a requirement not at issue in this case) is relatively small, and since several candidates have in the past two elections appeared on the ballot by filing petitions, the filing deadline which is challenged here should be judged only by the lowest "rationality" standard of equal protection review applicable to economic classifications. Yet, not a single one of the decisions of this Court cited in the State's Brief at pp. 9-18 articulates or applies the "two-step" test the State contends relieves it of the burden of showing that its early filing deadline is intended to serve (and does in fact serve) a compelling or at least important state interest.[8] And similar arguments were

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[8] Ohio is wrong in suggesting that this Court has excused states from justifying particular restrictive ballot access provisions where the over-all burden of the states' ballot access laws taken as a whole has been judged not to be substantial. *See, e.g., Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("important state interest" in requiring showing of support sustained five percent petition signature requirement); *Storer v. Brown*, 415 U.S. 724 (1974) (compelling state interest in promoting political stability sustained disaffiliation provisions). While the compelling state interest inquiry will not "automatically invalidate every substantial restriction on the right to vote

rejected by the First and Fourth Circuits in striking down early filing deadlines in Maryland and Maine at the behest of Congressman Anderson.[9]

Moreover, Ohio's theory of this case would make a mockery of the constitutional standard by wrenching it from its underlying purpose, which is to reconcile legitimate state interests in regulating ballot access (such as weeding out frivolous candidates) with the fundamental right of voters to be able to select from among those serious candidates who have demonstrated widespread community support. Under Ohio's reasoning, the filing deadline could be moved even further back from the general election if only the number of signatures were made smaller (*e.g.*, 100 signatures instead of 5,000).

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or to associate," *Storer v. Brown*, 415 U.S. at 729, this Court has never suggested that one unconstitutionally discriminatory ballot access restriction may be saved because other provisions of state law relating to ballot access are relatively lenient. Instead, the states have been called on to justify challenged provisions, and, in some instances, have been successful in demonstrating that the provisions at issue serve important or compelling state interests.

[9] An approach identical to that suggested by Ohio, employed by a district court in 1980 to affirm North Dakota's "new party" filing deadline of 15,000 signatures by June 1, was reversed by a unanimous panel of the Court of Appeals for the Eighth Circuit in *McLain v. Meier*, 637 F.2d 1159, 1162-65 (1980). The Court of Appeals there observed that, based upon its reading of this Court's precedents, the supposed threshhold requirement of a "substan[tial] burden," raised to significance by the district court, "has not been difficult to meet" because of the importance of voting rights. *Id.* at 1163. The Court noted that ballot access restrictions traditionally had been required to be "justified by reference to a compelling state interest, and may not go beyond what the state's compelling interests actually require, . . . because the fundamental right to vote is inseparable from the right to place the candidate of one's choice on the ballot," *id.*, and held that the June 1 filing deadline, because it was more than 90 days before the party primaries, was "unnecessarily removed from the time of the major parties' most active campaigning" and required "a third party candidate to qualify at a time when the individual's candidacy may be purely potential and contingent upon developments that occur months later." *Id.* at 1164.

Yet such a test would sustain precisely those laws which encourage frivolous candidacies (since persons who decide long before the election, irrespective of national and political events, to seek public office could do so on a virtually non-existent showing of support), while precluding serious and substantial candidates irrespective of the depth of their community support.[10]

III. THE COURT OF APPEALS' VOTER EDUCATION RATIONALE IS CLEARLY AN AFTERTHOUGHT AND CANNOT JUSTIFY OHIO'S DISCRIMINATORY EARLY FILING DEADLINE

In its Brief, the State simply reiterates without elaboration or support the Court of Appeals' implausible argument that an early filing deadline serves the State's interest in "voter education." Judged by any kind of rigorous scrutiny, the filing deadline certainly cannot withstand constitutional challenge by reference to this alleged state interest, since it is hardly "necessary" for voters to have eight months to study independent presidential candidates before they can exercise their franchise intelligently. This the State implicitly recognizes by arguing that the deadline is "rationally related" to voter education needs because it is the act of "declaration" that causes voters to "pay attention to" the candidate's publicly-announced positions—which, presumably, the

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[10] It also appears to be the logical implication of Ohio's argument that the earliness of a filing deadline for independent presidential candidates can *never* be regarded as substantially burdensome as long as that date coincides with the filing date for the state's presidential preference primary. Yet some early primary states have filing deadlines that precede the general election by over ten months. *See, e.g.*, Ill. Ann. Stat. ch. 46, § 7-11 (Smith-Hurd Supp. 1982) (78 days prior to date of March primary which, for 1980 election, was December 31, 1979); Mass. Ann. Laws Ch. 53, § 48 (Michie/Law. Co-op. Supp. 1982) (first Friday in January—*e.g.*, January 4, 1980); N.H. Rev. Stat. Ann. § 655:50 (Supp. 1981) (44 days prior to primary—January 11, 1980). Ohio's March 20 deadline is now virtually the earliest in the country; adopting its rationale in this case would permit states in the future much greater leeway to restrict nonmajor party candidates than they have ever enjoyed in the past.

voters would otherwise ignore. Respt's Br. at 38. This explanation of the filing deadline as a voter education device, however, is belied not only by its discriminatory character, since it allows all other contenders nearly five additional months before their candidacies must be "announced" to Ohio voters, but also by how the statute actually operates.

Ohio law provides for a period of public inspection of nominating petitions, and for a procedure for certifying the validity or invalidity of signatures. These processes, however, for *independent* nominating petitions do not even begin until June 15—three months after they are filed. See Joint Stipulation of Fact ¶ 21, Cert. App. 73a.[11] Thus, the independent nominating petitions are not transmitted to local election boards for public inspection and signature verification until the Monday or Tuesday after the June primaries. Joint Stip. ¶ 39(8), Cert. App. 79a. The petitions are available for public inspection between June 15 and June 30 (but not before), and the local election boards do not certify to the Secretary of State the validity or invalidity of signatures until July 15. Ohio Rev. Code Ann. § 3513.262 (Page 1981). Protests may be filed up to and including July 30. *Id.* Thus, the Ohio public does not know for at least four months after March 20 whether the would-be independent candidate is even eligible to appear on Ohio's general election ballot.

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[11] The treatment of nominating petitions for candidates running in the primaries is in marked contrast. They are "promptly transmit[ted]" to the appropriate local election board, where they are "open to public inspection" for five days, Ohio Rev. Code § 3513.05 (Page 1981). They are then returned to the Secretary with a "certification of [the board's] determination as to the validity or invalidity of signatures thereon," and protests must be filed by the sixty-fourth day before the primary—or within 11 days of the filing deadline. The Secretary must certify the official primary ballot on the sixtieth day before the primary. *Id.*; *see also*, Joint Stip. ¶ 39, Cert. App. 76a-79a.

Ohio attempts to bolster the Court of Appeals' plainly erroneous voter education rationale by resort to cases dealing with durational residency requirements for candidates. But these cases are simply irrelevant to the issue whether Ohio's discriminatory filing deadline for independent candidates is reasonably designed to achieve any legitimate, much less compelling, state voter education purpose. The requirements at issue in such cases as *Sununu v. Stark*, 383 F. Supp. 1287 (D.N.H. 1974), *aff'd mem.*, 420 U.S. 958 (1975), and *Hadnott v. Amos*, 320 F. Supp. 107 (M.D. Ala. 1970), *aff'd mem.*, 401 U.S. 968 (1971) and 405 U.S. 1035 (1972), involved no discrimination based on partisan affiliation. Moreover, they embodied qualifications for nonfederal office which have a long tradition in state history—unlike Ohio's early filing deadline for independents which, as we showed in our main Brief, was introduced at a relatively late date in Ohio's history as part of an exclusionary scheme to make access to the ballot difficult for all but the major parties.[12]

The Court of Appeals' other suggestion, echoed by Ohio in its Brief, that an early filing deadline for independent candidates helps voters decide to whom they should make campaign contributions, simply cannot justify or even explain the discriminatory nature of this statute. In the first place, as indicated above, Ohio voters remain unaware of the validity of independent nominating petitions until at least late July. Second, there is such substantial shifting and changing of options throughout the

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[12] Petitioners pointed out in their main Brief that Ohio, unlike some other states, had never taken any other steps relative to the presidential campaign to recognize or advance an alleged important state interest in voter education. The State responds by arguing that Ohio has "recognized the importance of voter education in other provisions of its election laws," Respt's Brief at 36, but then cites only provisions of state law such as expenditure reporting and advertising attribution requirements which are familiar anti-fraud devices, not voter education measures.

primary process that any added information derived from requiring early filing by independents is of doubtful marginal value.[13] Third, the filing deadline provides information, if at all, only about independent candidates, leaving party candidates free to by-pass Ohio's primary or to decide to seek the Presidency after Ohio's filing deadline has passed—and still to solicit funds from Ohio voters.

Like the durational residency requirements this Court struck down in *Dunn v. Blumstein*, 405 U.S. 330 (1972), Ohio's filing deadline founders because of its "crudeness as a device for achieving the articulated state goal of assuring the knowledgeable exercise of the franchise." *Id.* at 357-58. Of the voter education rationale advanced by the state in that case, the Court said:

> Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is 'necessary' to reside for a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections. . . . Especially since Tennessee . . . clos[es] . . . registration books 30 days before an election, there can be no basis for arguing that any durational residence requirement is also needed to assure knowledgeability.

Id. at 358. *A fortiori* in the case of an election for national office involving national and international issues, imposition of a disqualifying filing deadline on independent candidates alone almost eight months prior to the general election can hardly be justified by the necessity to "inform" voters about the candidates' positions.

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[13] Campaign contributions to major party presidential candidates in the general election campaign are, of course, prohibited where the candidate accepts federal financing. 26 U.S.C. § 9012(b)(1).

IV. OHIO'S FILING DEADLINE CANNOT BE JUSTIFIED BY ASSERTED STATE INTERESTS IN PREVENTING INTRA-PARTY FEUDING WITHIN OHIO POLITICAL PARTIES, OR PREVENTING THOSE PARTIES FROM LOSING THEIR ACTIVISTS

In this Court, Ohio claims that "one effect" of Anderson's decision to seek the Presidency as an independent in April was to "entice away from the Republican party in Ohio many of its hard-working activists," Respt's Br. at 37, and thus seeks to justify its early filing deadline as a means of preventing a partisan candidate from depriving a major party of its active supporters by attracting them to his cause as an independent. This argument is not only unsupported by anything in the record concerning the purposes of the filing deadline or the history of Congressman Anderson's campaign, it suggests implementation of a wholly illegitimate State interest in major party hegemony. The State's allegation that Ohio's Republican party lost many active party workers is based solely on the stipulated fact that ten of twenty-two Anderson supporters active in his Republican campaign prior to April 24 remained active after he declared as an independent. Jt. Stip. ¶ 29, Cert. App. 74a-75a. The record is silent as to whether these ten individuals had ever been active in party politics, were even members of the Republican Party, or would have supported another Republican (as opposed to, say, President Carter) if Anderson had simply dropped out of contention altogether on April 24.[14] All of Anderson's Repub-

[14] The State never sought to make any factual record on this point in the District Court. Had it done so, petitioners would have sought to supplement the record to demonstrate that, *e.g.*, petitioner Laufman is a Democrat; petitioner George Hetrick regards himself as an independent (although he has voted in Republican primaries); Anderson's Ohio Coordinator Diana Hetrick also has regularly voted across party lines; Anderson's Field Coordinator William Massuros, see Jt. Stip. ¶ 29, is a Democrat who has worked actively in prior campaigns on behalf of Democratic candidates; and that the major-

lican supporters, of course, remained free to work for and vote in the Republican Party primary for their favorite remaining Republican (and, if he was nominated, to support him in the general election campaign rather than Anderson). It was undoubtedly because the Republican Party seemed unlikely to nominate someone whom large numbers of Ohio Republicans found acceptable in light of their own political preferences that they turned to Congressman Anderson in the first place. Ohio has absolutely no legitimate state interest in preventing voters with an active interest in presidential politics from evaluating the various candidates and choosing at some time after March 20 of an election year to support a candidate other than a major party nominee.[15]

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ity of those active in Anderson's Ohio campaign both before and after his declaration as an independent, including Ms. Hetrick, had never worked actively before for any candidate.

[15] That this Court upheld the 8-month registration cut-off for voters wishing to vote in party primaries in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), in no way implies that similar restrictions may be placed on voter participation in the general election. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330 (1972); *cf.* 42 U.S.C. § 1973aa-1(d) (no state may cut off voter registration for Presidential election earlier than 30 days before election day). The lengthy preregistration period in *Rosario* was sustained because it was tied to a "particularized legitimate purpose [that] is in no sense invidious or arbitrary"—preventing abuse of one party's primary by recently affiliated voters who in fact wish to benefit the other party. 410 U.S. at 760-62. Voters dissatisfied with the results of New York's primaries remained free to place an independent candidate on the ballot as late as September. N.Y. [Elec.] Law § 6-158(9) (McKinney 1978).

Ohio's early filing deadline intrudes far more substantially on the range of choices available to voters at the general election than either a party affiliation requirement such as New York's, or a disaffiliation provision such as that at issue in *Storer v. Brown*, 415 U.S. 724 (1974). Disaffiliation provisions prevent only certain individuals from being nominated as independent candidates; in California voters dissatisfied with likely party choices have until late

Ohio's second argument, that a March filing deadline for independents is necessary to prevent "intraparty feuding during the primary election campaign" (Respt's Br. at 44), is totally illogical in the presidential context, where the intraparty conflict within Ohio inevitably continues at least until Ohio's June primary, and persists on the national level (and probably within state parties) until the convention. While the constitutionality of a state "sore loser" provision for presidential candidates is not at issue in this case, such a statute would at least arguably tend to promote political stability if it prevented a partisan primary loser, or a loser at a national party convention, from subsequently appearing on Ohio's ballot as an independent candidate.[16] But Ohio's early filing deadline does not purport to achieve that end. Indeed, as the State recognizes in its Brief, Ohio *has* a "sore loser" provision which, because of petitioner Anderson's timely withdrawal from the primary, did not bar his candidacy.[17]

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summer to place an independent contender on the ballot. Cal. [Elec.] Code § 6833 (Deering 1977 & Supp. 1982). An early filing deadline, however, absolutely prevents any independent candidate from appearing on the November general election ballot if he has not succeeded in qualifying for the ballot by March.

[16] It bears noting that the lynchpin for this Court's sustaining the disaffiliation requirements for independent congressional candidates at issue in *Storer v. Brown*, 415 U.S. 724 (1974) was that, apart from the petition signature requirements, the "qualifications required of the independent candidate are very similar to, or identical with, those imposed on party candidates." 415 U.S. at 734. The Court looked at the favorable effects of the disaffiliation provision only after it concluded that, because of comparable affiliation provisions for party candidates, it was not invidious or discriminatory.

[17] Ohio's statutory structure clearly rebuts the State's argument that the early filing deadline is one of a matrix of laws intended, together, to assure the integrity of the separate party and independent routes to the ballot. Under Ohio law, a primary candidate in the Presidential primaries may *withdraw* from the primary up to 30 days before it is held. Ohio Rev. Code Ann. § 3513.30 (Page 1981). While the State now asserts that this statute has the "obvious" purpose of avoiding "voter confusion," Respt. Br. at 45, in the

In its Brief, the State resurrects an argument virtually abandoned in the District Court: that even though Ohio's sore loser provision did not bar petitioner from the ballot, this Court may still sustain the filing deadline on the ground that in the particular circumstances of Congressman Anderson's campaign, it serves what respondent now perceives to be a "back-up" sore loser function. However, as the District Court below and other courts that have considered this argument have recognized, *e.g.*, *Salera v. Tucker*, 399 F. Supp. 1258, 1267 (E.D.Pa. 1975), *aff'd*, 424 U.S. 959 (1976), the filing deadline itself was never intended to serve this function, would do so in this case only "by happenstance," and because of its discriminatory and overbroad impact accomplishes the goal respondent seeks to enshrine as an important state interest (preventing a candidate who begins a campaign in other states as a Republican from filing as an independent in Ohio) only by substantially and discriminatorily burdening fundamental rights.[18]

District Court the State had argued that "the obvious purpose of R.C. 3513.30 is to enable a party candidate who has decided not to seek election to avoid the embarrassment of having his name nevertheless remain on the ballot where it may attract very few votes . . ." Def. Mem. In Opp. To Summary Jt., at 7. It seems plain, however, that the purpose of the withdrawal provision is—as was the case here—to permit candidates to *avoid* the sore loser ban, Ohio Rev. Code Ann. § 3513.04 (Page 1981), otherwise applicable to primary contestants. Thus, had a candidate simultaneously filed independent and partisan nominating petitions, by withdrawing from the primary in timely fashion, he could continue with his independent candidacy.

[18] Ohio's effort to preclude petitioners from attacking the early filing deadline under the "overbreadth doctrine" is wholly misplaced. Ohio would have this Court rule that because the State might constitutionally have enacted a sore loser or disaffiliation provision that would have barred Anderson's candidacy (but did not do so), Anderson and his supporters cannot challenge the filing deadline because, by happenstance, it accomplished the same result, i.e., keeping Anderson off the ballot. The cases cited by respondent provide no support for an argument premised on a statute that might have

Finally, Ohio's purported effort to promote the political stability of the two major parties within Ohio adversely affects the interests of voters not only in Ohio but across the country in the unique context of the presidential election. The national interest in having serious, substantial presidential candidates placed before all the voters cannot be ignored. While it is true that the states have a constitutionally mandated role in determining the "manner" of appointment of presidential electors, U.S. Const., Art. II, § 1,[19] as Justice Harlan argued in his concurring opinion in *Williams v. Rhodes*, 393 U.S. 23, 42 (1968):

> Just as a political group has a right to organize effectively so that its position may be heard in court . . . so it has the right to place its candidate for the Presidency before whatever body has the power to make the State's selection of Electors. Consequently, it makes no difference that the State of Ohio may, under the Second Article of the Constitution, place the power of Electoral selection beyond the control of the general electorate.

Noting that the purpose of the electoral college was to permit an informed choice of the best possible candidate, Justice Harlan urged that this purpose could be defeated by restricting the class of citizenry that could be considered for the office on a basis other than merit. *Id.* at 43-46. Ohio's effort to narrow the class of presidential candidates (and electors) whom its citizens can consider is based not on merit, nor on legitimate administrative necessities relating to the "manner" of appointment chosen by the State, nor on any other compelling ground.

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been, but was not, enacted. *See, e.g., Clements v. Fashing, supra* (plaintiff holding office as Justice of Peace, as to whom resign to run provision was valid, could not challenge statute's applicability to other offices); *Storer v. Brown, supra* (candidates validly barred by one existing provision could not raise constitutionality of others).

[19] *Comp.* U.S. Const., Art. I, § 4 (states may determine the "Times, Places and Manner" of congressional elections).

Rather, it is an overt attempt to exclude serious, non-major party candidates well in advance of the time their competitors are chosen. This is inconsistent with the process contemplated by Article II of the Constitution, and violates both the First Amendment and Equal Protection Clause.

CONCLUSION

For the foregoing reasons, and those set forth in petitioners' main Brief, we respectfully submit that the decision of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 81-1635

Office - Supreme Court, U.S.
FILED
JUL 20 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

JOHN B. ANDERSON, GEORGE H. HETRICK, LESLIE LAUFMAN, M.D., GERALD M. EISENSTAT,
Petitioners,

—against—

ANTHONY J. CELEBREZZE, JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF STATE OF OHIO,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OHIO FOUNDATION AS *AMICI CURIAE*

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INTEREST OF AMICI*

The American Civil Liberties Union (ACLU) is a national organization comprising more than 250,000 members. The American Civil Liberties Union of Ohio Foundation (ACLU of Ohio) is the Ohio affiliate of the ACLU. The ACLU and its affiliates have been traditionally devoted to the protection and enhancement of fundamental liberties and basic civil rights.

Within a representative democracy, no right is more fundamental than the "equal right to vote." Evans v. Cornman, 398 U.S. 419, 426 (1970). Accordingly, this

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*/ The parties have consented to the filing of this brief, and documents conferring consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

Court has repeatedly recognized the importance of rights of electoral participation and political association.

The instant controversy, involving the constitutionality of Ohio's filing deadline for independent presidential candidates, deeply implicates these important political and associational interests. Indeed, it is the position of amici that Ohio's filing deadline impermissibly abridges these fundamental rights of political expression and association. Amici respectfully submit this brief to advance their position to this Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

Representative democracy rests upon the "consent of the governed" and this "consent" is, in turn, obtained by permitting the people to freely and fairly choose their political leaders. Alexander Hamilton observed that the essence of representative government is "that the people should choose whom they please to govern them." 2 Elliot's Debates 257.

This unexceptional proposition was also explored by Chief Justice Warren who noted that representative democracy "is undermined as much by limiting whom the people can select as by limiting the franchise itself." Powell v. McCormack, 395 U.S. 486, 547 (1969). Accordingly, our contemporary claim of commitment to democratic government has a hollow ring when we design laws that fail to confer upon our citizens the widest possible freedom to choose among the candidates seeking the presidency.

Unfortunately, the state of Ohio has enacted such a law. During the last presidential election year, Ohio sought to enforce a statutory provision which required, in essence, that an independent presidential candidate seeking to appear on the November general election ballot must file nominating petitions no later than March 20, 1980. This statutory requirement, if enforced, would have excluded John Anderson from the Ohio ballot during the 1980 presidential election. Voters in Ohio would thus have been denied the opportunity to meaningfully express their electoral support for candidate Anderson and the political position that he was advancing.

Under these circumstances, it is plain that Ohio's decision to deny Anderson a place on the ballot would have substantially abridged rights of political association, voting and candidacy--rights which find their ultimate source in the First Amendment commitment to

democratic decisionmaking. In this regard, a presidential campaign is a paradigmatic occasion for the exercise of First Amendment freedoms, serving as a national forum for airing ideological positions and inviting widespread political debate. Application of a filing deadline to a significant independent candidate impedes these expressive activities and constricts the valuable contributions that new party and independent candidacies provide within our political system.

For these reasons, the instant filing deadline can only be upheld if it survives strict judicial scrutiny, advancing compelling governmental interests by means least likely to intrude upon fundamental constitutional rights.

Ohio's filing deadline is unnecessary to the advancement of any compelling governmental interests. Purporting to advance the goal of "political stability," Ohio seeks to police national presidential elections by requiring

independent candidates to firmly fix their political coalitions and candidacies some seven months before the general election. In this respect, Ohio's regulation intrudes excessively into national political arrangements. It also impermissibly discriminates in favor of major parties and against independents. Ultimately, Ohio's intrusiveness must be seen as an impermissible attempt to maintain the political status quo--an attempt that is dysfunctional toward long-term interests in political stability.

The other justifications advanced by Ohio, in defense of its statute, are equally without merit. Ohio's claim that its filing deadline assures equal treatment of partisan and independent candidates is utterly irrational. The assertion that the deadline assures an informed electorate is an hypothesized after-the-fact rationalization which does not satisfy the requirements of strict scrutiny. Moreover,

even if such a goal had been sought by the legislature, Ohio's statute is too crude a device to achieve that goal. The state simply cannot be permitted to freeze out independent coalitions seven months prior to the general election under the guise of assuring an informed electorate.

ARGUMENT

I.

OHIO'S FILING DEADLINE ABRIDGES THE FUNDAMENTAL RIGHT TO VOTE, THE RIGHT TO RUN FOR OFFICE, AND THE FIRST AMENDMENT RIGHT OF POLITICAL ASSOCIATION. ACCORDINGLY, THE STATUTE MUST BE SUBJECTED TO STRICT JUDICIAL SCRUTINY.

Restrictions on access to the ballot, such as those at issue here, burden several fundamental though concomitant constitutional rights. The right of political association, the right to vote and the right to run for office have emerged as discrete interests worthy of broad constitutional protection. Yet, at the core of these rights is the First Amendment concern that democratic decision-making depends upon the fullest possible participation of the citizenry in political affairs. See A. Meiklejohn, Political Freedom (1948).

A. Ohio's Filing Deadline Abridges the Rights of Political Association.

This Court has repeatedly recognized the

right of association as a correlative substantive freedom derived from the First Amendment's protection of free speech and assembly. In protecting the right to associate and organize for the advancement of shared ideological positions, the Court has acknowledged the vital link between associational freedom and the attainment of other First Amendment interests. "Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.... It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech...." NAACP v. Alabama, 357 U.S. 449, 460 (1958).

The First Amendment right to associate is especially vital to the functioning of

our democratic system when it is invoked to protect associational activity in the political process. In Williams v. Rhodes, 393 U.S. 23 (1968), this Court invalidated parts of Ohio's restrictive scheme for gaining access to the ballot as impermissibly burdensome on minority parties. Justice Black, writing for the majority, characterized the right of assocation as "among our most precious freedoms" and observed that "the right to form a party...means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes." Id. at 30-31.

When the Court invalidated Illinois' party affiliation statute in Kusper v. Pontikes, 414 U.S. 51 (1973), Justice Stewart observed that "[t]here can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group

activity' protected by the First and Fourteenth Amendments [citations omitted]. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." More recently, in Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979), the Court observed that "freedom to associate as a political party [is] a right we have recognized as fundamental."

The fundamental nature of this right of political association is not limited, however, to partisan activity. The traditional party structure is not the exclusive format by which those with political ambition associate for the advancement of their political programs. Like partisan politicians, independent candidates can and do form political associations to enhance their effectiveness. And the associations that coalesce around independent candidates are entitled to

plenary constitutional protection no less than are the traditional party associations. Storer v. Brown, 415 U.S. 724, 746 (1974); Buckley v. Valeo, 424 U.S. 1 (1976).

Ohio's filing deadline statute substantially burdened the associational activity of petitioner Anderson and his supporters. Barring a candidate with state and nationwide support from the ballot effectively denies the candidate and his supporters a meaningful opportunity to associate in furtherance of their political goals and programs. If Ohio had not been enjoined from enforcing the filing deadline statute, petitioner Anderson's political association would have been deprived of "much of the substance, if not the form, of [its] protected rights....Just as a political group has a right to organize effectively so that its position may be heard in court, or in the legislature...so it has the right to place its candidate for the Presidency

before whatever body has the power to make the state's selection of electors." Williams v. Rhodes, 393 U.S. 23, 41-2 (1968).

Early filing deadlines arguably do not deprive candidates such as Anderson and his supporters of all opportunities to associate for the advancement of their particular views. But a total restriction is not required for constitutional invalidity. A "substantial restraint," (NAACP v. Alabama, supra at 462) or a "significant interference," (Bates v. Little Rock, 361 U.S. 516, 523 (1960)) is sufficient to raise serious constitutional concerns. In overturning an Illinois voter affiliation statute, the Court noted that although the challenged statute did not "absolutely preclude" plaintiff from exercising the right to associate, "[a] prime objective of most voters in associating themselves with a particular party" is "to select the candidates for public

office to be offered to the voters at the general election." By restricting this form of political participation, Ohio's statute "substantially abridge[s] [the] ability to associate effectively." Kusper v. Pontikes, 414 U.S. 51, 58 (1973).

The presidential campaign is a paradigmatic occasion for the exercise of First Amendment freedoms.[1/] It serves as a national forum for airing social programs and ideological positions. It invites the widespread discussion of ideas. It fosters political debate. Candidates for the presidency enjoy unparalleled media attention and capture the interest of a far larger

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1/ See discussion that appears in the Appendix to this Brief. In the Appendix, amici discuss the importance of presidential election campaigns as opportunities for the injection of new ideas into our political debate; the manner in which such third party movements and independent candidacies have contributed to this debate; and the effect of early filing deadlines upon such contributions.

audience than candidates for any other elective office. Thus, in addition to serving as the mechanism for selecting our chief executive, the presidential campaign functions as a vehicle for educating and involving the electorate in matters of national concern.

A filing deadline that eliminates strongly supported independent contenders from the campaign denies to their supporters an important national forum. Without a candidate to serve as a focal point and spokesperson, there is very little chance of gaining the ear of the electorate. This Court has noted: "As the records of [third] parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. [citations omitted]. Overbroad restrictions on ballot access jeopardize this form of political expression." Illinois State Board of Elections v. Socialist Workers Party, supra at

186.

B. Ohio's Filing Deadline Abridges the Right to Vote and the Right to Run For Office.

Like the right of political association, the right to vote is so inextricably intertwined with those freedoms basic to our democratic form of government that it has been characterized by the Court as "preservative of all other...rights." Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); see also Yick Wo v. Hopkins, 118 U.S. 356 (1886). This Court has often observed that "No right is more precious in a free country than that of having a voice in the election of those who make the laws....Other rights, even the most basic, are illusory if the right to vote is undermined." Wesberry v. Sanders, 376 U.S. 1, 17 (1964). See also Dunn v. Blumstein, 405 U.S. 330 (1972).

The Court has not only repeatedly

underscored the fundamental nature of the right to vote, but it has expanded its focus from an interest in protecting the franchise from invidious discrimination to one that would ensure that the right to vote is meaningful. Chief Justice Warren signalled this trend in Reynolds v. Sims when he observed that "each and every citizen has an inalienable right to full and effective participation in the political processes," 377 U.S. 533, 565 (1964). Subsequently, in Williams v. Rhodes the Court struck down a series of Ohio's election statutes, noting that the restrictions on candidacy were violative of "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." 393 U.S. 23, 30 (1968). See also Evans v. Cornman, 398 U.S. 419 (1970); Carrington v. Rash, 380 U.S. 89 (1965).

The Court in Williams made clear

that the right to vote entails more than merely the right to cast a ballot. To the extent that restricting the field of candidates limits the voters' freedom of choice, the effectiveness of the right to vote is reduced. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979). The right to vote and the right of candidacy are thus inextricably bound together. As the Court observed in Bullock v. Carter, "the rights of voters and the rights of candidates do not lend themselves to neat separation." 405 U.S. 134, 143 (1972).

When the names on an election ballot leave many Americans with no opportunity to demonstrate strongly held political attitudes, their right to cast their votes effectively has been abridged. A voter's opportunity to cast a ballot has little significance if there is no candidate standing

for her or his interests. Accordingly, Justice Fortas has noted:

> "It is not merely the casting of the vote or its mechanical counting that is protected by the Constitution. It is the function -- the office -- the effect given to the vote, that is protected. A vote is...the sacred and most important instrument of democracy and freedom. In simple terms, the vote is meaningless -- it no longer serves the purpose of the democratic society -- unless it, taken in the aggregate with the votes of other citizens, results in effecting the will of those citizens...." Fortson v. Morris, 385 U.S. 231, 250 (1966).

Similarly, in Turner v. Fouche, 396 U.S. 346, 362 (1970), the Court noted that there is "a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." In Lubin v. Panish, Chief Justice Burger stated that "the right of a party or an individual to a place on the ballot is entitled to protection...."

415 U.S. 710, 716 (1974). See also Shakman v. Democratic Organization of Cook County, 435 F.2d 267 (1970); Stapleton v. Clerk for City of Inkster, 311 F.Supp. 1187 (E.D.Mich. 1970); White v. Snear, 313 F.Supp. 1100 (E.D.Pa. 1970).

In assessing the federally protected rights at stake here, it remains critically important to remember that petitioner Anderson was not merely a candidate for state or local office. Rather, he was a candidate for the presidency -- the only office for which citizens in every state jointly vote together -- and, indeed, he was eligible for ballot status in almost all other states.[2/] Exclusion from the ballot

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2/ At the time that the instant controversy commenced, only a handful of other states had filing deadline statutes similar to that which is being employed here. See, e.g., Maine's statute which was invalidated in Anderson v. Quinn, 634 F.2d 616 (1st Cir. 1980); and the Maryland statute

(fn. cont. on next page)

in one state necessarily would have affected the rights of Anderson supporters nationwide. Any diminution in the number of electoral votes for which Anderson was permitted to compete would have had an appreciable negative impact on the effectiveness of votes cast for him elsewhere. Exclusion from the Ohio ballot would have similarly reduced the credibility of Anderson's nationwide campaign and the force of the coalition that Anderson was seeking to generate. In these circumstances, as well, Ohio's decision to limit access to its ballot assumes national dimensions. See Oregon v. Mitchell, 400 U.S. 112 (1970).[3/]

(fn. cont. from preceding page)
which was invalidated in Anderson v. Morris, 636 F.2d 55 (4th Cir. 1980).

3/ The Court has previously recognized that Congress has a large measure of power to regulate elections for federal office, a power conferred both by express constitutional provisions and the very structure

(fn. cont. on next page)

In all of these respects, Ohio's filing

(fn. cont. from preceding page)
of the federal system. See, e.g., Oregon v. Mitchell, supra; Burroughs v. United States, 290 U.S. 534, 544-45 (1934). In addition, as the Court has noted, the federal interest in electing the president may be such as to substantially constrict any state interests that could be advanced as countervailing. See, e.g., Democratic Party of the United States v. Wisconsin, 450 U.S. 107 (1981). In light of these principles, amici believe that this Court may and should play a role in this field similar to that it undertakes in Commerce Clause cases, vindicating the federal interest not only where Congress has specifically acted but also without such congressional action where a state interference "trespasses upon national interests." Great Atlantic & Pacific Tea Co. v. Cottrell, 424 U.S. 366, 373 (1976). As in Commerce Clause cases, where state laws concerning the election of the president address matters of strong local concern, such as requirements of demonstrated support, e.g. Jenness v. Fortson, 403 U.S. 431 (1971), the state interest would be weighed against the interference with the national interest. See, e.g., Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851). Where, however, as in the present situation, the state interest is minimal and the burden on federal interest strong, the state restriction should be invalidated. See, e.g., Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945). See generally, Kassel v. Consolidated Freightways, 450 U.S. 662 (1981); Tribe, American Constitutional Law, 319-342 (1978).

deadline seriously abridges fundamental rights of association, voting and candidacy -- rights which find their ultimate source in the First Amendment's commitment to democratic decisionmaking.

C. Ohio's Filing Deadline Must Be Subjected To Strict Judicial Scrutiny.

Where, as here, Ohio's filing deadline violates fundamental rights of association, voting, and candidacy, the statutory scheme can only be upheld if it survives strict judicial scrutiny, advancing compelling governmental interests by means least likely to intrude upon fundamental constitutional rights. Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Dunn v. Blumstein, 405 U.S. 330, 336-38 (1972).

In evaluating the constitutionality of the instant statute, the Court of Appeals expressly declined to apply strict scrutiny.

Rather, the Court of Appeals looked to and relied upon a line of judicial authority relating to the constitutionality of laws that impose numerical petitioning requirements[4/] upon candidates seeking access to the ballot. That reliance was totally misplaced.

In assessing the constitutionality of such signature requirements this Court has often advised trial courts to inquire into whether such requirements bar a "reasonably diligent candidate" from securing access to the ballot. Only if the "reasonably diligent candidate" would be deterred from access to the ballot will such signature requirements be invalidated. See Jenness v. Fortson, 403 U.S. 431 (1971); American Party of Texas v. White, 415 U.S. 767 (1974); Mandel v. Bradley, 432 U.S. 173

4/ These numerical petitioning requirements typically require that a minimum number of signatures be gathered within a fixed period of time.

(1977).

The Court of Appeals viewed this "reasonably diligent candidate" test as inviting a level of judicial inquiry that was different from and far less stringent than the strict scrutiny methodology that is applied whenever fundamental rights are infringed. Thus, the Court below interpreted the "reasonably diligent candidate" standard as permitting a reviewing court to simply balance "the state interests furthered [by the law in question] against the concomitant burden on access to the ballot." Pet. App. at 18a.[5/] Applying the reduced level of scrutiny contemplated by such a balancing test, and considering only the interests of the individual plaintiffs rather than the larger federal interest which a national presiden-

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5/ Reference is to Sixth Circuit opinion as it appears in the Appendices to the Certiorari Petition.

tial election inevitably entails, the Court of Appeals upheld the Ohio statute.

In two important respects, the Court of Appeals seriously misconceived the nature and purpose of the "reasonably diligent candidate" line of authority.

First, the "reasonably diligent candidate" cases address a discrete administrative problem not present here and such cases have little utility for the resolution of the instant controversy. Cases such as Jenness and Mandel[6/] specifically reflect

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6/ In Mandel v. Bradley, 432 U.S. 173 (1977), this Court remanded a challenge to Maryland's early filing deadline with instructions to apply the "reasonably diligent candidate" standard. As discussed above, the Mandel analysis is inapposite here.

The issue raised in the instant case, whether a state may impose an absolute ban on a late arising candidacy, whatever its degree of support, was not raised in Mandel and, indeed, could not have been. In Mandel, plaintiff candidate Bradley

(fn. cont. on next page)

the obvious proposition that not all persons seeking to appear on the ballot can be granted such access without rendering the ballot cumbersome and confusing. See H.D. Croly, Progressive Democracy (1914) at 289. Accordingly, the "reasonably diligent candidate" standard is applied exclusively in the evaluation of laws that attempt to filter out candidates lacking a "significant measurable quantum of community support."

(fn. continued from preceding page)
challenged the filing deadline only insofar as it increased the difficulty of obtaining signatures. Indeed, Bradley, who declared his candidacy quite early and began collecting signatures several months before the Maryland deadline, would not have had standing to raise the issue presented in this case. Since Bradley challenged the deadline only as increasing the difficulty of collecting signatures much as a short period for signature gathering would, this Court reasonably applied the "reasonably diligent candidate" test to determine whether Maryland's requirements were unconstitutionally burdensome.

In the instant case, however, no amount of "diligence" would have won petitioner Anderson a place on the ballot. The Mandel test simply does not apply.

American Party of Texas v. White, 415 U.S. 767, 782-783 (1974). But, the Ohio statute at issue here cannot be understood as a law designed to award access to the ballot only to serious candidates. Here, as in McCarthy v. Briscoe, 429 U.S. 1317 (1970), the state law "provides no means by which an independent presidential candidate might demonstrate substantial voter support" (Id. at 1322) if that candidate, responding to serious dissatisfaction with the major parties' platforms and candidates, decides to run late in the election year. Under the present Ohio statute, even a candidate with significant popular support and an extraordinary organization could not attain a place on the ballot if the issues which inspire his candidacy occur even seven months before the election.

Second, contrary to the Sixth Circuit's view, cases employing the "reasonably dili-

gent candidate test" are not outside the mainstream of the strict scrutiny methodology. Indeed, this test can be seen to fit comfortably with the general adjudicative process of heightened judicial scrutiny in either of two ways. First, it might be said that a petitioning requirement that does not bar a reasonably diligent candidate from the ballot does not substantially restrict access to the ballot and, therefore, does not trigger the inquiry into whether the restriction is "necessary to further a compelling state interest." Alternatively it might be said that signature requirements that limit the ballot only to "reasonably diligent candidates" satisfy heightened judicial scrutiny in that they are "narrowly tailored" and "necessary" to the advancement of a "compelling governmental interest." Under either interpretation, the "reasonably diligent candidate" test would be properly

perceived as entirely consistent with the heightened scrutiny methodology.

Accordingly, the Court of Appeals plainly erred in failing to measure the Ohio statute against the requirements of strict scrutiny. In the ordinary course, restrictions upon fundamental rights of association, voting and candidacy must be subject to this heightened level of review. In the present case, the claim for strict scrutiny takes on a special measure of force, flowing from the strong national interest that exists where, as here, a state seeks to deny ballot access to a significant presidential candidate.

This conclusion, hardly subject to doubt in light of previous cases, has been recently confirmed by the decision of this Court in Clements v. Fashing, ___ U.S. ___, 50 U.S.L.W. 4869 (June 25, 1982). In Clements the Court upheld two Texas provi-

sions that imposed limitations upon certain state officials seeking state elective office. One provision rendered certain state officeholders ineligible for the Texas Legislature unless their current terms of office expired before the commencement of the Legislative term to which they aspire. A second provision required certain officeholders to resign from their state office before they could run for a different position. In upholding these provisions, both Justice Rehnquist's plurality opinion for four members of the Court and Justice Brennan's dissent for three agreed that provisions such as that at issue here would be rigorously scrutinized. In commenting upon the two categories of cases where substantial limitations upon candidacy are subjected to strict scrutiny, Justice Rehnquist expressly observed that "[t]he second line of [such] cases involve classification schemes

that impose burdens on new or small political parties or independent candidates." Id. at 4871.

Believing Texas' limitations upon candidacy to be a violation of the First Amendment, Justice Brennan plainly applied heightened scrutiny in evaluating the Texas scheme. Thus, the Clements case, again, reflects the view that statutes of the sort at issue here must be measured by heightened judicial scrutiny.

As we now demonstrate, when subjected to such scrutiny Ohio's filing deadline is inadequate.

II.

OHIO'S FILING DEADLINE IS UNNECESSARY TO THE ADVANCEMENT OF ANY COMPELLING GOVERNMENTAL INTERESTS.

Three state interests have been advanced in support of Ohio's filing deadline. Two of these governmental concerns were proferred by the defendants in the District Court. The third of these putative governmental concerns, and the one relied upon most prominently by the Court of Appeals, emerged for the first time in the Court of Appeals opinion.

In the District Court, the State of Ohio argued, first, that its filing deadline advances a state interest in "political stability" and, second, that it assures equal treatment of partisan and independent candidates. In upholding the statute, however, the Court of Appeals relied upon neither of these two asserted interests. Rather, the Court of Appeals fashioned an entirely dif-

ferent rationale in support of the Ohio enactment. The Court of Appeals concluded that the filing deadline was beneficial because it enhanced voter knowledge of the candidates. Each of these proferred state interests is inadequate to justify the substantial abridgment of fundamental rights that Ohio's filing deadline imposes.

A. Ohio's Desire To Achieve Political Stability Is Impermissible If The State Is Simply Trying To Protect The Political Status Quo.

In Williams v. Rhodes, 393 U.S. 23 (1968), this Court reviewed Ohio's ballot access provisions, which had rendered it extraordinarily difficult for any political party other than the Republican and Democratic parties to appear on the ballot. In defense of its law, the State of Ohio maintained that its statute advanced the governmental interest of promoting the two-party system. The Court, however, rejected this

defense. It noted that "the Ohio system does not merely favor a 'two-party system'; it favors two particular parties -- the Republicans and the Democrats -- and in effect tends to give them a complete monopoly. There is, of course, no reason why two parties should retain a permanent monopoly on the right to have people vote for or against them." Id. at 32. Thus, the Court concluded that Ohio's desire to protect the political status quo was impermissible and unjustified.

The legislative history underlying the present filing deadline strongly suggests that Ohio's legislative purpose is no more permissible here than it was in Williams v. Rhodes, supra. The legislative history recited by petitioners (see, e.g., Cert. Pet. at 15) indicates that, when the instant filing deadline was enacted, Ohio was again attempting to maintain the political status quo and to protect the Republican and Democratic

parties from third party and independent challenges.

In light of this legislative history, it would certainly seem that Ohio's filing deadline conflicts with the spirit and thrust of Williams v. Rhodes, supra. If, as suggested by the history, Ohio's interest in "political stability" is nothing more than a desire to protect the political status quo, such a goal must be regarded as constitutionally impermissible.

B. Ohio's Desire To Achieve Political Stability By Requiring Independent Presidential Candidates To Firmly Fix Their Political Candidacies And Coalitions Some Seven Months Before The General Election Is Discriminatory, Excessive and Drastically At Odds With American Electoral Patterns. Nothing in Storer v. Brown Supports Ohio's Instant Behavior.

The failure of any valid state interest interest in political stability to justify Ohio's early filing deadline for independents can best be seen by close examination of the leading case in which that interest was seri-

ously addressed by this Court, Storer v. Brown, 415 U.S. 724 (1974).

In Storer, this Court upheld the constitutionality of a California statute that required a person terminating his affiliation with a political party to wait "12 months before he [could] become a candidate in another party's primary election or an independent candidate for public office." Id. at 734. In so doing, the Court focused upon the particular primary election procedures that California had developed for itself. It recognized the legitimacy of California's "interest in the stability of its political system." (Id. at 736, emphasis added) and the capacity of California to protect its own primary elections for statewide office.

This Court's approval of California's disaffiliation scheme as serving a valid interest in "political stability" provides no justification for Ohio's filing deadline

statute. There are a variety of respects in which the statute at issue in Storer is very different from that presented by this controversy.

In Storer, California was concerned only with the effectiveness of its own primary election machinery.

On the other hand, Ohio's filing deadline is not at all designed to protect Ohio's own primary elections. Nothing on the face of the statute would suggest that Ohio seeks, by its filing deadline, to protect the integrity of the state's primary election. Moreover, Ohio has expressly enacted a separate "sore loser" statute, especially designed to prevent an individual from running and losing in an Ohio primary election and then subsequently running as an independent in the general election. Ohio Rev. Code Ann.

§3513.04.[7/] To the extent that Ohio has any interest in protecting the integrity of its own primary elections, the Ohio "sore loser" statute serves that interest more than adequately. The filing deadline statute is thus unnecessary to protect the integrity of any Ohio election.

The question, therefore, arises as to what interest in electoral stability is, in fact, protected when, as here, Ohio invokes its filing deadline in connection with a presidential candidate seeking access to the general election ballot. In this circumstance, Ohio can only be saying that it seeks to police our national political campaigns in order to ensure that independent presidential

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7/ As discussed in the Petition for Certiorari, John Anderson was permitted to withdraw from the Ohio primary well before the primary election. He was never a candidate in the Ohio primary election. Accordingly, Ohio's "sore loser" statute did not bar him from the ballot. Cert. Pet. at 11.

candidates firmly fix their political candidacies and coalitions some seven months before the general election. When viewed in this fashion, such an interest in "stability" is at once perceived as discriminatory, excessive and drastically at odds with American electoral traditions.

Ohio's imposition of such stability only upon independent candidates discriminates in favor of partisan candidates and against independents to a significant degree. Ohio is plainly insisting that independent candidates stabilize their coalitions and candidacies by March while it permits the two major parties to continue their coalition building and political maneuvering through the mid-summer political conventions. This deference to the major political parties is reflected in the fact that Ohio requires the independent to file a declaration of candidacy by March 20, 1980. But, the major party

nominees are permitted to file their declarations of candidacy after the party nominations are chosen during the mid-summer conventions. Such disparate treatment between independents and major parties plainly violates First Amendment "equality" or "neutrality" principles.[8/] See, Williams v. Rhodes,

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8/ First Amendment "equality" principles rest upon the proposition that government must remain neutral with respect to the expressive or speechmaking activity of its citizens.

The First Amendment's proscription against governmental favoritism extends to a prohibition against the state favoring or disfavoring citizens because of their political affiliation. This concept was expressly articulated in NAACP v. Button, 371 U.S. 415, 445 (1963), where the Court observed:

> "[T]he Constitution protects expression and association without regard to the race, creed or political or religious affiliation of the members of the group which invoke its shield, or to the truth, popularity or social utility of the ideas and beliefs which are offered."

supra; Police Department v. Mosley, 408 U.S. 92, 95 (1972); NAACP v. Button, 371 U.S. 415, 445 (1963); Buckley v. Valeo, 424 U.S. 1 (1976); Greenberg v. Bolger, 497 F.Supp. 756, (E.D.N.Y. 1980).

In this regard, the Ohio law is very different from the California disaffiliation statute that was approved in Storer. Under the California statute, independent candidates as well as major party candidates were required to disaffiliate for one year before running under a different political banner. Thus, the Storer Court expressly noted that the California statute "involve[d] no discrimination against independents." Id. at 733. Unlike the present Ohio deadline, California's provision did no violence to First Amendment equality principles.[9/]

9/ The California disaffiliation statute is also very different from Ohio's filing deadline with regard to the impact that

(fn. cont. on next page)

Ohio's attempt to regulate the stability of a presidential campaign also immediately distinguishes the Ohio effort from that which was upheld in Storer. In Storer, California was merely trying to ensure the integrity of its own state and local elections and its domestic electoral processes. In contrast, Ohio carries its devotion to political sta-

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(fn. continued from preceding page)
each has upon coalitions of potential voters. The California law required that an "independent candidate not have been affiliated with a political party for a year before the primary." Id. at 733. Therefore, in its potential impact upon a group of disaffected voters the California law only restricted the one particular candidate that the disaffected group might support. Under the present Ohio law, however, not only party members but any person is prohibited from running as an independent, if he does not declare by an early date. Accordingly, if disaffected voters do not coalesce to form a group until after "the principal policies of the major parties" are known (Williams v. Rhodes, supra at 33), they will be unable to find any representative candidate at all. Under the Ohio statute even a lifelong independent will not be allowed to appear on the ballot as the candidate for this disaffected group.

bility into the national arena. Its effort to influence the national political calendar and the presidential selection process in this manner was neither contemplated nor approved by this Court's decision in Storer. Such an intrusion into the national electoral process must be regarded as excessive[10/] and unjustified.[11/]

Finally, Ohio's desire to ensure political stability within the presidential selection process cannot be carried so far as to close the door to independent candidacies, arising out of widely felt dissatisfaction

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10/ See discussion of the important national interests that must necessarily limit the reach of Ohio's regulatory statute as set forth supra at p. 14 n. 3.

11/ Ohio provides absolutely no reasons as to why it should pursue this quixotic quest to ensure that all independent presidential candidates, seeking to appear on the Ohio ballot, announce their intentions seven months before the election.

with the choices provided by the major political parties. In the Appendix following this argument, amici demonstrate the importance of third party movements and independent candidates to the American political tradition. We show that such candidacies have contributed notably to the diversity of public debate and have significantly influenced the ultimate acceptance of substantial social reform within this country.

We also demonstrate that these third party and independent candidacies typically develop because of dissatisfaction with the nominees of the major political parties. They serve, in this respect, as a systemic safety valve for the discontented. And they very often do not emerge as political movements until after the major political parties have concluded their presidential nomination processes.

Given this pattern, early filing dead-

lines constrict the development of independent candidacies and necessarily reduce the capacity of these candidacies to serve this "safety-valve" function.[12/] In this respect, as well, early filing deadlines invoked in the name of political stability may very well disserve that interest. For in the long run, constricting dissent and diversity is likely to have a destabilizing influence. Chief Justice Warren suggested this theme in Sweezy v. New Hampshire, 354 U.S. 234, 250-251 (1957):

> "All political ideas cannot and should not be channeled into

12/ In discussing the safety-valve function of free expression, Professor Thomas Emerson observes that "a system of free expression is designed to encourage a necessary degree of conflict within a society....[I]t attempts to avoid resort to force and violence by channeling this conflict into the area of expression and persuasion." Emerson, The System of Freedom of Expression (1970) at 11.

> the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups...The absence of such voices would be a symptom of grave illness in our society."

To the extent that Ohio's filing deadline ignores this important historical lesson it is extremely shortsighted and dysfunctional toward the goal of political stability.

C. Ohio's Claim That Its Filing Deadline Assures Equal Treatment of Partisan And Independent Candidates Is Utterly Irrational.

In defense of its statute, Ohio also asserts that it is treating all candidates equally. In 1980 Ohio required candidates seeking to run in Ohio's June primary election to file their nominating petitions on March 20, 1980 and therefore, in the name of equal treatment, Ohio would have required candidates seeking a place on the ballot in the November general election to file their nominating petitions on March 20. From the

standpoint of simply administering the electoral system, there may be sound reasons to require that a candidate seeking to run in a June primary election file petitions by the beginning of April. But, there seems no such plausible reason to require that a candidate seeking access to the general election ballot in November file nominating petitions by March 20.

Ohio does no service to the principles of equality by treating equally that which is not equal. A petition drive to appear on a primary ballot is so very different from a petition drive to appear on a general election ballot that Ohio's desire to treat them equally must be viewed as irrational.[13/]

13/ If, indeed, Ohio had genuinely sought to treat independents and partisan candidates equally, it would have been more appropriate to look to the date upon which Ohio requires the major parties to provide the names of the party nominees who will

(fn. cont. on next page)

D. The Assertion That Ohio's Deadline Assures An Informed Electorate Is An Hypothesized After The Fact Rationalization Which Does Not Satisfy The Requirements Of Heightened Judicial Scrutiny. Moreover, Even If Such A Goal Had Been Intended By The Legislature, Ohio's Filing Deadline Is Too Crude A Device To Achieve That Goal.

In upholding Ohio's filing deadline,

(fn. continued from preceding page)
appear on the November ballot. If Ohio can wait until the end of August to prepare its ballot because the major party conventions have not chosen candidates until that time, there is no apparent reason why independent candidates (with properly demonstrated support) should not be permitted to file at that time as well. As American political history shows, it is precisely the constricted range of choice that the major parties have on occasion offered which has generated substantial third-party or independent support for alternative candidates, notwithstanding the tremendous pressures against such candidacies which our political system as it has developed has created. See Appendix, infra. Indeed, amici believe that the constitutional rights of political association and ballot access suggest, and that our history confirms, that independent or new party presidential candidates must be permitted to demonstrate the requisite support until shortly after the major parties have chosen their nominees.

the Court of Appeals found that the statute was a useful device for insuring that the electorate would be familiar with the candidate. This asserted interest in an informed electorate, as a potential justification for the instant statute, never surfaced in the District Court.

The belated invocation of this rationale is inappropriate where, as here, strict scrutiny is the standard of review. Heightened judicial scrutiny demands more of the state than hypothesized "incantations" and "after the fact rationalizations" in order to justify legislation. Cleveland Board of Education v. La Fleur, 414 U.S. 632, 653 (1974); Trimble v. Gordon, 430 U.S. 762 (1977). Rather, those who seek to support a statute must demonstrate that the governmental interests advanced in defense of the legislation in question are the interests that the legislature had in mind

when the statute was enacted. Weinberger v. Weisenfeld, 420 U.S. 636, 648 (1975); Garner v. Louisiana, 368 U.S. 157 (1961) (Justice Harlan concurring).

In this case, defendant has apparently proferred no evidence -- either in its briefs or in the stipulations filed with the trial court -- demonstrating that the desire to ensure an informed electorate was an interest that the Ohio legislature ever considered when it enacted Ohio's filing deadline statute. Accordingly, this post facto rationalization must be rejected as an inadequate justification for the continued enforcement of the Ohio statute.

Moreover, even if the legislature had expressly enacted the filing deadline statute for the purpose of assuring an informed electorate, such a legislative interest must be rejected as irrational and impermissible under the circumstances of this case.

Indeed, this Court has not looked favorably upon statutory restrictions of First Amendment activity where such restrictions are invoked in the name of assuring an informed citizenry.

In Dunn v. Blumstein, supra, the Court specifically addressed the use of durational residency requirements, employed as a device for "assuring the knowledgeable exercise of the franchise." Id. at 358. In rejecting the use of such an electoral device to achieve an informed electorate, the Court noted:

> "Given modern communications, and given the clear indication that campaign spending and voter education occur largely during the month before an election, the State cannot seriously maintain that it is 'necessary' to reside for a a year in the State and three months in the county in order to be knowledgeable about congressional, state, or even purely local elections. There is simply nothing in the record to support the conclusive presumption that residents who

> have lived in the State for less than a year and their county for less than three months are uninformed about elections." Id.

Similarly, in Mills v. Alabama, 384 U.S. 214 (1966), this Court struck down a state statute, which made it a crime for a newspaper on election day to publish an editorial urging people to vote a certain way, despite the state's attempt to defend the law as "a salutary legislative enactment that protects the public from confusive last-minute charges and countercharges and the distribution of propaganda...." Id. at 219. As the Court has held even in a commercial context, where the First Amendment interests were of substantially lesser moment than they are in this case, the constitution rejects "this highly paternalistic approach...It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely avail-

able, that the First Amendment makes for us." Virginia Pharmacy Board v. Virginia Consumer Council, 425 U.S. 748, 770 (1976).

In sum, even if Ohio's filing deadline had been designed to ensure an informed electorate, it can, when defended on these grounds, fare no better that the statutes that were invalidated in Dunn and Mills. In Dunn the Court concluded that durational residency requirements "too crudely exclude[d] large numbers of fully qualified people." The same must be said of Ohio's filing deadline. The state simply cannot be permitted to freeze out independent or new party movements five months prior to the major party conventions under the guise of assuring an informed electorate.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

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*/ Counsel wish to thank Daniel Greenwood, a student at the Yale Law School for his invaluable assistance in the preparation of this brief.

APPENDIX

THIRD-PARTY MOVEMENTS AND INDEPENDENT CANDIDACIES, MANY OF WHICH HAVE SURFACED ONLY IN THE AFTERMATH OF THE TWO MAJOR-PARTY CONVENTIONS, HAVE CONTRIBUTED DISTINCTIVELY TO THE AMERICAN POLITICAL TRADITION.

By establishing a filing deadline for independent candidates that falls some 75 days before the party primaries and 229 days before the general election, Ohio effectively closes its doors to independent candidates that arise out of a genuine, widely felt dissatisfaction with the candidates and policy positions of the major political parties. Such a statutory scheme ignores the value and importance to our political tradition of third party and independent candidates.

The minor parties and independent candidates have been characterized as "a crea-

tive force and a sort of conscience, an ideological governor to keep major parties from speeding off into an abyss of mindlessness.. .."*/ If this judgment seems a bit harsh on the major parties, it is, nevertheless, the case that throughout our history, third parties and independent candidates have emerged repeatedly to dissent from the dominant parties' ideologies, to serve as a systemic safety valve for the discontented, and to provide a means of giving voice to valid proposals for change -- proposals that, with remarkable frequency, have ultimately found their way into the platforms of the major political parties. Such candidacies have traditionally focused attention on serious societal problems and offered creative solutions. As one historian has noted, third

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*/ Bickel, Reform and Continuity (1971) at 80.

parties "have stimulated -- sometimes by frightening them -- the lethargic or timid politicians of the major parties. They have advocated reforms which the older parties have adopted and enacted into law. And sometimes they have trained leaders for the major parties."*/ Political scientist Howard Penniman views the third parties as vitally important to our political system in that they are uniquely able to think "more of principles than of power." Through third parties, he notes, sectional interests that cannot be reconciled with the existing blend of interests in the major parties may find political expression.**/

Numerous writers have advanced the no-

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*/ Hesseltine, The Rise and Fall of Third Parties (1971) at 80.

**/ Penniman, Sait's American Parties and Elections (1952) at 239.

tion that third parties, at critical junctures, fulfill the essential role of feeding new ideas into the mainstream policy-making process, ideas from which the major parties initially retreat.*/ The established parties, as creatures of compromise and coalition, tend to view excessive controversy and major reforms as inconsistent with the stability of the established order and contrary to their partisan interests. Thus, the tasks of pushing reforms before they have achieved currency and of establishing and selling the merits of forward-looking proposals often falls to minor parties and candidates. In this sense, third parties and independent candidates may be viewed as

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*/ For example, Haynes, Social Politics in the United States (1924); Hesseltine, supra; Odegard and Helms, American Politics (1949).

a dynamic force within our political system, the risk takers that provide the competition of ideas upon which democratic decision-making depends. As Alexander Bickel has observed, "the minor party would have to be invented if it did not come into existence regularly enough. It is an indispensable part of the system...."*/

Significant third parties and independent candidates have particularly emerged in the United States during times of political crisis or severe social stress. Characteristically, their emergence has been indicative of a failure of the major parties to accommodate the interests of a substantial group of individuals who have first attempted to exert an influence within the two-party structure. As such, they have served

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*/ Bickel, supra at 80.

the important function of generating debate, clarifying issues, and disseminating ideas that might not otherwise be addressed by cautious major-party candidates. A brief look at several of these third-force movements makes clear the valuable contributions they have made to our political tradition.

During the ante-bellum period in the nineteenth century, the settlement of the frontier territories and the slavery question gave rise to several third parties. In the election of 1848, the prevailing political wisdom within the major parties ultimately dissuaded the major party candidates from adopting strong abolitionist positions. Still, until the major-party conventions made clear that both the Whigs and Democrats intended to skirt the slavery and settlement issues, abolitionists in both parties remained open to compromise and desirous of

forging a solution within the established party system. When this hope was frustrated, the Free Soil Party emerged to bring the conflict to the fore in the 1848 and 1852 presidential campaigns. Thus, a third party played a crucial role in dramatizing a political issue and thereby forcing the major parties to respond. In this case, the Free Soil themes were seized by the Republican Party in 1856 and eventually translated into public policy in the 1860s.*/

The historic capacity of third parties to marshal support for reform and to drive the major parties toward an accommodation of diverse interests was again illustrated by the Populist movement. When both the Democrats and Republicans ignored the interests of the agrarian South and West in their nom-

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*/ See Foner, Free Soil, Free Labor, Free Men (1971).

inations for the 1892 presidential election, a third-party platform calling for governmental ownership of transportation, banking reform, the expansion of currency, and land reform was formulated to give expression to the largely ignored agrarian interests. In the years following the 1892 election, many items in the Populist agenda were ultimately enacted into law and Populist ideas were absorbed and given expression by both the Republican and Democratic parties.*/

The Progressive Party of 1912 similarly emerged, following the major-party conventions, as an outgrowth of a rift in the Republican ranks. Theodore Roosevelt's reform platform called for regulation of corporations, a system of social insurance, integrity in government, a minimum wage for

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*/ See Goldman, Rendezvous With Destiny (1952); Hofstadter, The Age of Reform (1955).

women, safety and health regulations in industry and popular election of U.S. Senators.*/ In the 1924 presidential election year, Robert LaFollette's candidacy on a third-party progressive platform arose in response to the perceived failure of the major parties to adequately respond to the gross economic inequities that then existed within American society. The subsequent impact of the progressive movement vis-a-vis social and economic reforms proved substantial. Many attribute major portions of the New Deal programs of Franklin Roosevelt to the Progressive platforms of earlier decades. The strands of progressivism that ran through the twenties were woven into the fabric of New Deal liberalism and, although

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*/ See Pringle, Theodore Roosevelt (1956); Goldman, Rendezvous With Destiny, supra.

the tenor of the New Deal reform movement differed from that of the Progressive era, the two shared a similar vision, addressed many of the same fundamental problems, and proposed comparable solutions.*/

In light of the severe impact Ohio's early filing deadline has on third-party movements that emerge in response to, rather than in advance of, the formulation of major-party platforms, it is especially crucial to note that the historic third-force candidacies discussed here took shape after the major parties had selected their candidates and after such parties defined the contours of their respective platforms.

In 1848 the Free Soil Party convened on August 19 and nominated Martin Van Buren for president. But they did so only after the

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*/ See Goldman, Rendezvous With Destiny, supra.

Republican and Democratic Conventions had chosen candidates that were unacceptable to the anti-slavery policies urged by the Free Soilers. In 1892, the Republicans and Democrats each met in June and chose Benjamin Harrison and Grover Cleveland as their respective candidates. The Populists, dissatisfied with the Democrats' choice, met in July of that year to nominate James B. Weaver. In 1912, Theodore Roosevelt and William H. Taft engaged in a bitter fight for the Republican nomination. When Roosevelt lost the nomination at the June convention, his followers condemned the process by which Taft was chosen and they urged Roosevelt to run against Taft as a third-party candidate. In August 1912 the Progressive ("Bull Moose") Party met in Chicago and nominated Roosevelt as its candidate. And in 1924, the Republicans nomi-

nated Calvin Coolidge in June. The Democrats convened in June although the nomination contest between William McAdoo and Alfred E. Smith became deadlocked and John W. Davis did not emerge as a compromise choice until the 103rd ballot on July 9. The Progressive Party which ultimately nominated Robert LaFollette did not begin to organize a campaign until July.

In sum, third-party movements and independent candidacies have contributed notably to the variety of public debate and to the development of significant political and social reform. Typically, these candidates have developed because of dissatisfaction with the nominees of the major parties. Accordingly, third-party and independent candidates generally have not emerged until after the major parties concluded their nomination process. Given this pattern, an

early filing deadline, such as that at issue here, conflicts with a well-established political tradition that has repeatedly proven its value over the course of American electoral history.

Amicus Brief

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Office - Supreme Court, U.S.
FILED
JUL 14 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1635

IN THE

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OCTOBER TERM, 1981

JOHN B. ANDERSON, ET AL.,

Petitioners,

v.

ANTHONY J. CELEBREZZE, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE LIBERTARIAN NATIONAL COMMITTEE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE LIBERTARIAN NATIONAL COMMITTEE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS

The Libertarian National Committee is the governing body of the Libertarian Party, an affiliation of electors formed for the purpose of nominating and electing candidates to national, state and

local public office in each of these United States.[1] The Libertarian National Committee is interested in the outcome of litigation which may have a substantial impact on the ability of the Libertarian

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1. The Libertarian Party has affiliated local organizations in each of the fifty States and in the District of Columbia. These local organizations are recognized variously by the individual states as "affiliations of electors," "affiliations of voters," "partisan organizations," "minor political parties," "minority political parties," "new political parties," "primary political parties," "qualified political parties" or "political parties," dependent upon the applicable state statutes and upon the level of support the local organization has demonstrated by reason of the stated affiliation of registered electors, petition drives or votes polled in past elections. This Court has previously held that the right of an affiliation of voters to organize a political party is constitutionally protected. Williams v. Rhodes, 393 U.S. 23, 30-31 (1968). Accordingly, in the interest of clarity, "Libertarian Party" will herein be used to refer collectively to these local affiliated organizations and "political party" will herein be used to refer to any affiliation of voters formed for the purpose of becoming a political party.

Party to participate in the political process at the national and state level.[2]

Specifically concerning the instant case, the Libertarian National Committee is interested in the effect of this de-

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2. The presidential and vice presidential nominees of the Libertarian Party in 1980, Ed Clark and David Koch, were the first minor party candidates to appear on every available general election ballot (all fifty States and the District of Columbia) since the Socialist Party ticket in 1916 (all forty-eight States). In the same year, over five hundred Libertarian Party candidates ran for state and local public elective office.

It is the goal of the Libertarian Party to continue to attract public support for its platform and candidates. To that end, it is in the interest of the Libertarian Party to participate in the broadest possible range of national political events -- including, whenever possible, the presidential primaries. In order to promote its continued development into an established political party, the Libertarian National Committee believes it is in the interest of the Libertarian Party to incorporate the results of these presidential primaries into its candidate selection process at a national convention to be held at a time and in a manner similar to the national conventions of the Democratic and Republican Parties.

cision on the ability of the Libertarian Party to meaningfully take part in the upcoming presidential preference primary elections of those States in which the Libertarian Party is required by law to participate.

Whether the deadline for filing nominating petitions imposed by R.C. 3513.257 is unconstitutional will have a substantial impact on the ability of the Libertarian Party to incorporate the results of the presidential primaries into its nominating process and, concurrently, have its presidential ticket appear on Ohio's general election ballot.

2.(cont'd) The Libertarian National Committee thus has a vital interest in litigation challenging the constitutionality of state election laws which have heretofore made it impractical to schedule its National Convention after the presidential primaries in which it is eligible to participate.

SUMMARY OF ARGUMENT

The political process by which candidates are nominated and elected to the offices of President and Vice President of the United States is an area of national interest. This interest extends to the presidential primary elections.

Each State has important interests in restricting ballot access to serious candidates. To that end, the individual States may constitutionally require candidates to demonstrate a "modicum of support" sufficient to justify their placement on the ballot.

On the other hand, the means by which each individual State regulates access to its ballot is entitled to an equal presumption of validity. Each State may conduct its elections as it deems most proper, free from undue in-

terference from its neighbors. Those States which require an emerging political party to participate in their presidential primaries for the purpose of selecting delegates to a national convention are entitled to see that legislative purpose actuated, independent of the status of the emerging political party in Ohio.

Nomination by petition is the principal means by which an affiliation of voters, other than the two established parties, gains ballot position for its presidential ticket in Ohio. The early filing deadline for nominating petitions, however, precludes an affiliation of voters, required to participate in the presidential primaries of some States, but not in Ohio, from meaningfully participating in those primaries and, concurrently, qualifying its presidential

ticket for the Ohio ballot.

Because an emerging political party must qualify its candidates on as many ballots as possible to conduct a serious presidential campaign, Ohio's early filing deadline creates irreconcilable conflicts with the presidential nominating process found preferable by a clear majority of the States. In order to assure its presidential ticket a place on the Ohio ballot in the upcoming presidential elections, the Libertarian Party must schedule its nominating convention prior to the presidential primaries -- rendering the Libertarian Party's subsequent required participation in the presidential primaries a meaningless exercise and thwarting the legislative intent of those States which require the Libertarian Party to participate in such primaries.

To the extent that the early deadline for nominating petitions set forth in R.C. 3513.257 unduly interferes with the orderly and preferred political processes by which presidential and vice presidential candidates are nominated in Ohio's sister States, the statute intrudes into an area of national interest that is not "admitting of diversity of treatment" by individual States and so is unconstitutional.

ARGUMENT

I. R.C. 3513.257 is the de facto means by which both independent and minor party presidential tickets gain access to the ballot in Ohio.

Excepting only the two established parties,[3] Ohio provides two mutually exclusive means by which an affiliation of voters may nominate candidates for public office. An affiliation of voters may form a new political party and nominate a slate of candidates by means of an open primary election[4] or, in the alternative,

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3. The nominees of the Democratic and Republican parties are nominated by means of a "closed" primary election in which only those voters who have previously declared their affiliation with the respective party may cast their vote.

4. An affiliation of electors may form a political party pursuant to R.C. 3513.01 and 3517.01 by submitting, not later than 120 days prior to the date of Ohio's primary election, a petition containing the signatures of 1% of the number of electors who voted in the last gubernatorial or presidential election, or approximately 28,000 signatures.

an affiliation of voters may nominate candidates by petition.[5]

Because of the comparative difficulty in complying with statutes governing the formation of a new political party and the attendant risks occasioned by an open primary election,[6] nomination by petition is the de facto means emloyed

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5. An affiliation of electors may nominate by petition pursuant to R.C. 3513.257 by submitting, not later than 75 days prior to the date of Ohio's primary election, a nominating petition containing 5,000 signatures.

6. Ohio requires that the nominees of a new political party be nominated by means of an "open" primary election, an election open to any voter not affiliated with one of the two established parties. Under Ohio's statutory scheme it is entirely possible, if not probable, that after an affiliation of voters has complied with the provisions of R.C. 3513.01 and 3517.01, the "open" primary election will result in the nomination of a slate of candidates which is incompatible with the political goals which originally motivated the formation of the party.

by minor parties for nominating their presidential tickets in Ohio. Since their effective date, ten of the eleven minor party presidential tickets appearing on Ohio's general election ballot as a result of complying with one of these two methods of ballot access has been nominated by petition pursuant to R.C. 3513.257.[7]

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7. Since the effective date of R.C. 3513.257, there have been three presidential elections. In this period, eleven presidential nominees of minor parties have appeared on Ohio's general election ballot as a result of complying with one of the two avenues of ballot access, ten as a result of nomination by petition pursuant to R.C. 3513.257.

In 1972, three presidential candidates other than the presidential nominees of the Democratic and Republican Parties appeared on the general election ballot in Ohio. Two candidates, John Schmitz (American Independent Party) and Louis Fisher (Socialist Labor Party) appeared on the ballot as a result of a court decision, Socialist Labor Party v. Rhodes, 318 F.Supp. 1262 (1970). Gus Hall (Communist Party) was nominated by petition pursuant to R.C. 3513.257.

7.(cont'd) In 1976, six presidential candidates other than the presidential nominees of the Democratic and Republican Parties, appeared on the general election ballot in Ohio. One candidate, Lester Maddox (American Party) appeared on the ballot as the nominee of a new political party. One candidate, Eugene McCarthy, was nominated by petition as a "true" independent. The other four candidates, Gus Hall (Communist Party), Roger MacBride (Libertarian Party), Peter Canejo (Socialist Workers Party) and Lyndon LaRouche (U.S. Labor Party) were nominated by petition pursuant to R.C. 3513.257.

In 1980, six presidential candidates other than the presidential nominees of the Democratic and Republican Parties, appeared on the general election ballot in Ohio. One candidate, John Anderson, appeared on the ballot as the result of a court decision. The other five candidates, Barry Commoner (Citizen's Party), Gus Hall (Communist Party), Ed Clark (Libertarian Party), Rip Congress (Socialist Workers Party) and Deirdre Griswold (Workers World) were nominated by petition pursuant to R.C. 3513.257.

Since the effective date of the statutes, twelve presidential candidates have appeared on the general election ballot in Ohio as a result of complying with one of the two means of ballot access. Only one campaigned as a true "independent." Eleven were the nominees of national minor parties, but only one appeared as a result of an affiliation of voters successfully petitioning to form a new political party in Ohio.

II. R.C. 3513.257 precludes an affiliation of voters, required by law to participate in the presidential primaries in some States, but not in Ohio, from meaningfully participating in those primaries and, concurrently, having its presidential ticket appear on Ohio's general election ballot.

R.C. 3513.257 requires that a candidate seeking nomination by petition on Ohio's ballot for President of the United States file a statement of candidacy and nominating petitions bearing the signatures of at least 5,000 qualified voters by the 75th day before the first Tuesday after the first Monday in June immediately preceeding the general election. In the most recent general election, presidential candidates seeking nomination by petition were required to submit their statements and appended signatures no later than March 20, 1980.

In the same year, exclusive of Ohio, thirty-one States and the District of Columbia held presidential preference primary elections. Of these thirty-two primaries, only eight had been held prior to the March 20 deadline imposed R.C. 3513.257. [8]

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8. In 1980, the States which conducted presidential preference primary elections were, by date:

February 26..New Hampshire
March 4.....Massachusetts, Vermont
March 8.....South Carolina
March 11.....Florida, Georgia, Alabama
March 18.....Illinois
March 25.....Connecticut, New York
April 1.....Kansas, Wisconsin
April 5.....Louisiana
April 22.....Pennsylvania
May 3.....Texas
May 6.....District of Columbia, Indiana, North Carolina, Tennessee
May 13.....Maryland, Nebraska
May 20.....Michigan, Oregon
May 27.....Idaho, Nevada, Kentucky* Nevada
June 3.....California, New Jersey, New Mexico, Ohio, Rhode Island, South Dakota, West Virginia

* Discontinued effective 1984.

An affiliation of voters, required by law to participate in the presidential primaries in some States, but not in Ohio,[9] must necessarily choose between holding its national convention before or after Ohio's filing deadline. If scheduled far enough before Ohio's deadline to provide time to collect the necessary signatures to nominate its presidential

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9. As the result of votes polled in the 1980 general election, the Libertarian Party is required by statute to participate in next scheduled presidential primary elections in five States: California, Idaho, Nevada, North Carolina, and Wisconsin -- all will be held after the filing deadline for nominating petitions s.t forth in R.C. 3513.257.

The early filing deadline imposed by Ohio for nominating petitions precludes the Libertarian Party from incorporating these primary election results into its nominating procedures without sacrificing its prospects of having its presidential ticket appear on Ohio's general election ballot.

ticket, the national convention cannot incorporate the results of more than a few of the presidential primaries into its nominating process. If, in the alternative, the national convention is scheduled later, its eventual presidential ticket will be denied access to Ohio's general election ballot.

It is true that an affiliation of voters qualified to take part in a State's presidential primaries can, and sometimes must,[10] participate in such elections even after its presidential ticket has been nominated. It is equally true that participating in an election after the results are final is patently meaningless.

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10. In 1980, the Libertarian Party was required to participate in three presidential primaries after its presidential ticket had already been nominated: California, Idaho and North Carolina.

III. By precluding an affiliation of voters, required by law to participate in the presidential primaries of some States, but not in Ohio, from meaningfully participating in those primaries and, concurrently, having its presidential ticket appear on Ohio's general election ballot, R.C. 3513.257 imposes substantial burdens on fundamental rights of political association.

This Court has held that the First and Fourteenth Amendments provide protection to two closely related fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." Williams v. Rhodes, 393 U.S. 23, 30 (1968). "New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." Id. at 32.

It is unlikely that a new political party could emerge on the political scene so rapidly it could immediately qualify to participate in the primaries of every State having presidential primary elections, if for no other reason than the showing of support necessary to participate in such elections varies dramatically from State to State.[11] Accordingly, at some point in the normal growth and development of a national party it can be anticipated that the emerging party will be required to participate in the presidential primaries of some States before it has qualified to participate in the presidential primaries of others.

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11. The State of Utah requires a petition to form a new political party signed by five hundred qualified voters; the State of Maryland requires that at least 10% of the eligible voters be registered with the new political party and that the new party poll at least 3% of all the votes cast in the last statewide general election.

Although this is a necessary and logical step toward its full participation in the national political process, an emerging political party which has qualified to participate in the presidential primaries of some States, but not in Ohio, finds it may incorporate the results of these presidential primaries into its nominating process only by forfeiting its ballot position in Ohio. Either alternative clearly deprives the emerging political party of "an equal opportunity to win votes," Williams v. Rhodes, 393 U.S. at 31-32, and so burdens fundamental rights of political association.

IV. R.C. 3513.257 imposes unconstitutional burdens on fundamental rights of political association because it intrudes into an area of national interest not properly subject to diverse treatment by the individual states.

The political process by which candidates are elected to the offices of

President and Vice President of the United States is an area of national interest. The importance of primary elections in this political process was evidenced in the adoption of the Twenty-Fourth Amendment.[12] This Court has upheld the provisions of Subtitle H of the Internal Revenue Code of 1954[13] establishing a scheme for public financing of presidential primary election campaigns as furthering important governmental interests. Buckley v. Valeo, 424 U.S. 1, 105-108 (1976). Finally, as this Court has noted, the campaign itself must be

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12. The Twenty-Fourth Amendment to the Constitution of the United States provides: "The right of citizens of the United States to vote in any primary or other election for President or Vice President, ... , shall not be denied or abridged by the United States or any State by reason of failure to pay any poll tax or other tax."

13. 26 U.S.C.S. Section 9031 et seq.

national in scope, "a President is elected not by popular vote, but by winning the popular vote in enough States to have a majority in the Electoral College." Id. at 106.

This Court has recognized the States have a legitimate interest in requiring candidates and political parties to demonstrate some "modicum of support" before granting them access to the ballot. Jenness v. Fortson, 403 U.S. 431, 442 (1971). "The various exercises by the States of their police power stand, however, on an equal footing." Bibb v. Navajo Freight Lines, 359 U.S. 520, 529 (1959).

When one State, by imposing excessive restrictions on access to its presidential ballot, interferes with the orderly political process by which presidential and vice presidential candidates

are nominated in her sister States, that State intrudes into an area of national interest which is not properly subject to diverse treatment by the individual States. The early filing deadline for nominating petitions may well be an appropriate exercise of the police power as applied to candidates for state and local office in Ohio. As applied to candidates for national office, however, R.C. 3513.257 unconstitutionally usurps the appropriate exercise of the police powers of Ohio's sister States.

Conflicts between the States in the exercise of their police powers have been considered before by this Court in other contexts. In Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959), this Court stated that standing alone, an Illinois statute requiring contour mudguards could withstand constitutional scrutiny: "If we

had here only a question whether the cost of adjusting an interstate operation to these new local safety regulations prescribed by Illinois unduly burden interstate commerce, we would have to sustain the law ..." Id. at 526. Despite the "strong presumption of validity" accorded measures regulating highway safety, id. at 524, the Illinois statute was struck down by this Court because of conflicts with statutes of other States. Weighed against the national interest, this was one of those matters not "admitting of diversity of treatment, according to the special requirements of local conditions." Id. at 529 (quoting Sproles v. Binford, 286 U.S. at 390).

The Libertarian National Committee submits that the process by which the President and Vice President of the United States are nominated and elected

is no less an area of vital national interest than state regulation of mud-guards.

No serious presidential candidacy can afford not to compete for Ohio's large bloc of votes in the Electoral College. By imposing a filing deadline for nominating petitions of presidential candidates so early that it effectively deprives large segments of the national electorate of the opportunity to meaningfully participate in their own State's presidential primaries, in a way that has no correlation to the relative support of candidates for national office, the State of Ohio intrudes into an area of national interest not "admitting of diversity of treatment."

CONCLUSION

The Respondents have presented this case as if the filing deadline for nominating petitions set forth by R.C. 3513.257 is applicable only to independent candidates. The Respondents have likewise presented this case as if the impact of the filing deadline is limited to affiliations of voters confined to Ohio. Both premises are fallacious.

Since its effective date, R.C. 3513.257 has been the means by which ten of eleven minor party presidential tickets have gained ballot access to Ohio's general election ballot. In the same period, only one "independent" candidate has availed himself of ballot access by the statute. To the extent that recent history serves as a guide, R.C. 3513.257 is applicable to the presidential nominees of any emerging affiliation of vo-

ters, whether non-partisan or organized as a national political party.

The early deadline for filing nominating petitions provided by R.C. 3513.257 creates irreconcilable conflicts with the presidential nominating procedures of Ohio's sister States, especially where an affiliation of voters has qualified to participate in less than all of the presidential primaries. Such an early deadline for filing of nominating petitions of presidential and vice presidential candidates, even if enforced only by Ohio, necessarily burdens fundamental associational rights and disrupts the presidential nominating process preferred by a clear majority of the States.

By promulgating excessively burdensome restrictions on ballot access for national candidates, Ohio unduly interferes with the appropriate exercise of

the police powers by her sister States. Thus, R.C. 3513.257 unconstitutionally intrudes into an area of national interest not properly subject to diverse treatment by the individual States.

Respectfully submitted,

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Docket Sheet

NO. 81-1635-CFX	TITLE John B. ANDERSON, et al., Petitioners v. Anthony J. Celebrezze, Jr., Secretary of State of Ohio

DOCKETED	COURT
Mar. 4, 1982	United States Court of Appeals for the Sixth Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Mitchell Rogovin
	Counsel for Respondent: Joel S. Taylor
Jan. 8, 1982	Application for an extension of time to file petition for writ of certiorari and order granting same until March 4, 1982 by O'Connor, J, on Jan. 8, 1982.
Mar. 4, 1982	Petition for writ of certiorari filed. (RECORD FILED).
Mar. 4, 1982	Appendix filed.
Apr. 7, 1982	Brief for the respondent in opposition filed.
Apr. 14, 1982	DISTRIBUTED. 4-30.
May 3, 1982	Petition GRANTED.

May 14, 1982	Order extending time to file the joint appendix and PETITIONERS' brief on the merits until July 17, 1982.
May 14, 1982	Order extending time to file the RESPONDENT'S brief on the merits until September 15, 1982.
July 14, 1982	Brief, amicus curiae, of The Libertarian National Committee in support of petitioners filed.
July 17, 1982	Brief for the petitioners filed.
July 17, 1982	Joint appendix filed.
July 20, 1982	Brief, amici curiae, of The American Civil Liberties Union, et al. filed.
Sept. 15, 1982	Brief for the respondent filed.
Sept. 15, 1982	CIRCULATED.
Nov. 24, 1982	Petitioners' reply brief filed. (D).
Dec. 6, 1982	ARGUED..